

NOS. 21-50259 & 21-50261

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN CARLOS CABRERA,

Defendant-Appellant

Appeal from the
United States District Court
for the Southern District of California
Honorable Larry Alan Burns, District Judge Presiding

**APPELLANT'S EXCERPTS OF RECORD
VOLUME 3**

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1 UNITED STATES DISTRICT COURT
 2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
 3

4 UNITED STATES OF AMERICA,)
)
 5 Plaintiff,) No. 20-CR-435-LAB
)
 6 v.)
) June 9, 2021
 7 JUAN CARLOS CABRERA,)
) 9:00 a.m.
 8 Defendant.)
) San Diego, California
 9

10 TRANSCRIPT OF JURY TRIAL - DAY 2
 11 BEFORE THE HONORABLE LARRY ALAN BURNS
 12 UNITED STATES DISTRICT JUDGE

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1 the side of the cake box, remember that? That's what this is.
2 This is going to tell you what the elements are that must be
3 proved as to each of the counts.

4 In count one, the defendant is charged with being an
5 alien who attempted to enter the United States at a time or
6 place other than designated by immigration officers. To be
7 found guilty of that charge, the government has to prove the
8 following things beyond a reasonable doubt:

9 First, they have to prove that on the date of the
10 alleged entry, November 4th, 2019, that the defendant was an
11 alien. An alien is a person who's not a natural born or
12 naturalized citizen of the United States. That's the legal
13 definition of alien, a person who is not naturally born or
14 naturalized citizen of the United States, so that's the first
15 element. They have to prove on the date that this happened,
16 the defendant was an alien.

17 Second, they must prove that the defendant had the
18 specific intent to enter the United States free from official
19 restraint. A person has the intent to enter the United States
20 free from official restraint only if he has the intent to enter
21 the U.S. without being detected or apprehended or prevented
22 from going at large within the United States and mixing with
23 our population.

24 The government need not prove that entry free from
25 official restraint was the defendant's sole intent. However,

1 the government must prove that at the point the defendant first
2 entered the United States, he had the specific intent to enter
3 free from official restraint, not that that was his only
4 purpose but that that was part of his purpose, that he had the
5 specific intent to enter and go at large among the population,
6 so that's the second element.

7 Third, the government has to prove that the defendant
8 attempted to enter the United States at a time or place other
9 than a place designated by immigration officers, in other
10 words, someplace other than at a port of entry where you're
11 subject to inspection.

12 Fourth, that the defendant did something. He took
13 some action that was a substantial step toward committing the
14 crime of illegally entering the United States. Remember, this
15 is charged as an attempt. They're charging the defendant with
16 attempting to come into the United States.

17 So the fourth element, you must find that the
18 defendant did something that was a substantial step toward
19 committing the completed crime of actually entering the United
20 States and that strongly corroborated the defendant's intent to
21 commit the crime.

22 Let me say a word about substantial step. Preparing
23 to commit a crime, getting ready to commit a crime, is not a
24 substantial step so mere preparation doesn't cut it as a
25 substantial step to committing a crime.

1 To be a substantial step, a defendant's act or actions
2 must unequivocally show, must unequivocally demonstrate, that
3 the crime will be committed, the crime will take place, unless
4 it's somehow interrupted by independent circumstances, so
5 that's what's meant by this term substantial step.

6 Jurors don't need to agree unanimously on which
7 particular act or actions of the defendant amounted to the
8 substantial step provided all of you agree that the defendant
9 took some action that was a substantial step toward committing
10 the completed crime of actually entering the United States.

11 And then finally, the fifth element here is that the
12 defendant committed the offense after being convicted of a
13 prior offense of illegally entering the United States. In
14 other words, that sometime prior to November 4th of 2019 when
15 the defendant's alleged to have committed this offense, he had
16 previously been convicted of illegally entering the United
17 States.

18 So those are the five elements. They're spelled out
19 in this instruction as to count one.

20 Let me turn to count two. There's some similarities,
21 there's some differences. In count two, the defendant is
22 charged with being an alien who, after being excluded or
23 deported or removed from the United States, attempted to come
24 back in, attempted reentry.

25 To be found guilty of this charge in count two, the

1 government has to prove the following things to you beyond a
2 reasonable doubt:

3 First, they have to prove that sometime before the
4 date of the alleged entry, which was November 4th, 2019, the
5 defendant had been excluded, deported or removed from the
6 United States. That's the first element.

7 The second element is the same as it was for the first
8 crime that's alleged, that is that the defendant -- it must be
9 shown beyond a reasonable doubt the defendant had the specific
10 intent at the time he entered the United States to be free from
11 official restraint.

12 And, again, the same definition applies. That means
13 that you're coming in with the intention to go at large among
14 the population, not to be apprehended, not to turn yourself in,
15 but to go at large without being detected by authorities.

16 And, again, the same qualifications apply to this
17 definition. The government doesn't have to prove that the
18 defendant's sole intent was to go at large, but they must prove
19 that at the point that he first entered into the United States,
20 he specifically intended to enter free from official restraint
21 or at least that that was part of his intention and motivation
22 and that he specifically planned that, not that it was his only
23 purpose, but at least it was part of his purpose.

24 The third element is that the defendant was an alien
25 at the time that he attempted reentry. Again, I remind you an

1 alien is a person who's not a natural born and naturalized
2 citizen of the United States.

3 Fourth element here is that when the defendant
4 attempted to enter the United States on November 4th, he didn't
5 have any permission. He didn't have official permission from
6 official in the United States Government who's authorized to
7 give permission. That would include the Secretary of the
8 Department of Homeland Security. And you heard it actually is
9 permission to apply for permission, but essentially that it was
10 an unauthorized entry not sanctioned by any official who has
11 authority to allow someone to come into the United States or to
12 apply for entry to the United States.

13 And then, fifth, the government has to show that,
14 again, the -- this is an attempt crime, that he attempted to
15 reenter, that he did -- took some action that was a substantial
16 step towards committing the completed crime of actually
17 entering.

18 And the same definition of substantial step applies.
19 It's some action that shows that had there not been some
20 intervening fact, had the border patrol not shown up or
21 something else happened, that he likely would have made entry
22 and committed the completed crime of illegally entering the
23 United States.

24 So, and, again, the same qualifications apply to the
25 substantial step. Preparation to do something is not enough.

1 The actions have to show that the completed crime, which is
2 entering the United States, will take place unless interrupted
3 by independent circumstances.

4 So those are the two definitions. As you can tell
5 they -- some of the elements are the same. They conflate a
6 little bit, but there are differences. The main difference is
7 the first one requires a showing that the defendant had been
8 convicted of a prior illegal entry before and the second one
9 requires proof that he'd been removed.

10 There's some other differences so look those over and
11 compare the elements. And as I mentioned, your task here is to
12 find what the facts are and then use your analytical ability.
13 You look at the elements and say has this been proved, do the
14 facts establish each and every one of these elements.

15 Two crimes have been charged in this case and they're
16 separate crimes. Even though the elements overlap, a separate
17 crime is charged in both count one and count two and you have
18 to decide the counts separately. Your verdict on one count
19 doesn't necessarily control what your verdict on the other
20 count would be. So you look at the counts separately. You
21 reach an independent and unanimous decision as to each count.

22 Okay. Those are the instructions except for the last
23 five that have to do with deliberations. At this time, I'd ask
24 you to give your respectful attention to the lawyers. They'll
25 sum up the evidence.

1 The government goes first and then they have a chance
2 to reply so they get two arguments here and then the defense
3 goes second.

4 So you'll hear first from the United States, then
5 you'll hear from the defense. As I mentioned to you yesterday
6 when I showed you my -- one of my favorite devices up here, the
7 lawyers estimated that they would take no longer than 20
8 minutes altogether and they've asked me to remind them if we
9 get close to the 19th minute, so I'll keep track.

10 Who speaks for the government?

11 MR. MCDONALD: I will, Your Honor.

12 THE COURT: Mr. McDonald, you may make your closing
13 argument.

14 CLOSING ARGUMENT BY COUNSEL FOR THE GOVERNMENT

15 MR. MCDONALD: Good morning to you all. The
16 defendant, Juan Carlos Cabrera, that his purpose for climbing
17 that fence coming into the United States was to find work. He
18 is guilty of the crimes that have been charged.

19 Ladies and gentlemen, this is a simple case. It
20 remains a simple case. The defendant was removed from the
21 United States, most recently in April of 2018, but also several
22 times before that as you saw.

23 He had no permission to reenter the United States.
24 But he came back on November 4th of 2019 in Yogurt Canyon. He
25 couldn't come back to a port of entry because he didn't have

1 documents to go to a port of entry. He would have been turned
2 away.

3 So instead, he snuck into the United States. He
4 climbed over that fence with the barbed wire on top near Yogurt
5 Canyon five miles away from the port of entry. And then when
6 he was found by Agent Cisneros up against that crevice, he
7 admitted the truth, which is that his purpose for entering was
8 to find work.

9 These facts establish that this is a simple case and
10 the defendant is guilty of the two crimes that are charged.
11 And they are two related crimes as Judge Burns has just
12 instructed you. Count one is attempted unlawful entry after a
13 prior conviction of the same offense, and count two is
14 attempted reentry of a removed alien. After he'd been removed,
15 he came back.

16 And we'll walk through each of these elements briefly
17 and I think it's right that most of these elements are not
18 really in dispute. I think you heard Mr. Dudani in his opening
19 statement say that most of these are not in issue, and I think
20 that that's right. Based on the evidence, most of these are
21 not an issue at all.

22 These are the five elements for count one, attempted
23 unlawful entry, and I will go through them, though, because
24 it's still our burden to prove every element so I will go
25 through them and show you, give you confidence that each of

1 these elements has, in fact, been met.

2 The first is that Mr. Cabrera is an alien, just a
3 noncitizen of the United States. And we know that for various
4 reasons. His actions prove he's not a citizen of the United
5 States because citizens of the United States come through ports
6 of entry. They don't climb over Yogurt Canyon with the barbed
7 wire fence.

8 He admitted to Agent Cisneros that he was not a
9 citizen of the United States and he also previously admitted,
10 you saw the video with Agent Montoya, that he's not a citizen
11 of the United States. There's no question -- and he's also
12 been previously deported which is another factor that you can
13 take into account. There's no question that he is not a
14 citizen of the United States.

15 The next is that he had the specific intent to enter
16 the United States at a time or place other than is designated,
17 so outside of a port of entry where inspections happen and
18 there's no question of that as well.

19 Yogurt Canyon is not a port of entry and the defendant
20 made the intentional decision to jump the fence there. He --
21 after jumping the fence, he intentionally moved north towards
22 the secondary fence. He admitted as we know that he jumped the
23 border fence. He admitted that to Agent Cisneros.

24 This wasn't confusion. He didn't mistakenly jump the
25 fence there. It was intentional. It was intentional that he

1 did that. And why? It's because he didn't have the papers
2 that would let him come through at a port of entry, so he
3 intentionally, he had the intent to enter outside of a port of
4 entry through Yogurt Canyon.

5 The third element is the specific intent to enter the
6 United States free from official restraint. I'm going to save
7 that one because I think the defense said that is the element
8 that is an issue and I'm going to address that at the end when
9 I'm addressing both counts because that same element applies to
10 both counts. So I'm going to go to substantial step.

11 There's no dispute that there's a substantial step in
12 this case. The defendant actually climbed over that fence.
13 That alone is a substantial step. He actually crossed into the
14 United States and then he took a whole bunch of substantial
15 steps up that hill up to the secondary fence. This was not
16 mere preparation. He, in fact, crossed over into the United
17 States.

18 The fifth is that he suffered a previous illegal entry
19 conviction, and I want you to be careful on this point because
20 I don't want you to hold this against the defendant in any way.
21 This is an element that we have to prove and that's solely how
22 you should perceive this element.

23 You should give him a fair trial. Do not hold this
24 against him in any way. Other than that, it's an element that
25 we have to prove. And there's no question that he does, in

1 fact, have a prior illegal entry conviction. Exhibit 22 is a
2 judgment in a case involving United States of America versus
3 Juan Carlos --

4 MR. DUDANI: Objection, Your Honor, as to the
5 redaction issue that was discussed pretrial. This was not the
6 admitted exhibit.

7 THE COURT: All right. If it's not, don't show
8 something --

9 MR. MCDONALD: I won't show that.

10 THE COURT: -- that is different.

11 MR. MCDONALD: I do see that there was a redaction to
12 be made. I've pulled that off of the screen.

13 You'll see Exhibit 22 is a certified judgment and it
14 says Juan Carlos Cabrera is the defendant and it indicates that
15 he was convicted of an offense under 8 USC 1325, which is the
16 exact offense that the United States must prove.

17 Exhibit 21 that was admitted is the plea agreement
18 from that case and you see that the defendant agrees to plead
19 guilty to a single count superseding information charging that
20 and you can see the language there that he agrees to plead
21 guilty to a certain offense. And the bottom of that is an
22 offense in violation of Title 8, United States code, Section
23 1325, a misdemeanor. So that's what he agreed to plead guilty
24 to.

25 Now, how do we know that this is the same Juan Carlos

1 Cabrera? Well, Exhibit 20, which is a certified docket sheet,
2 it shows, and you can see it here, that the arrest date
3 associated with this case was August 10th of 2017 and the plea
4 agreement references that same date.

5 Well, what else do we know about August 10th of 2017?
6 That was the same date that Agent Montoya interviewed the
7 defendant, August 10th of 2017. And then the defendant's
8 fingerprints, as you heard from Ms. Hogue, they match the
9 fingerprint card that was taken from the defendant on August
10 10th of 2017.

11 And here's that fingerprint card. This was on
12 8/10/2017. His fingerprints were taken. Ms. Hogue took
13 separately his fingerprints and they match.

14 So there's no question that the defendant is the same
15 Juan Carlos Cabrera. That would be a huge coincidence that all
16 these things would have aligned and it not be him.

17 For count two, attempted reentry of a removed alien,
18 several of the elements we've already talked about, so they're
19 already crossed over. Element 2, that he's an alien. Element
20 5, substantial step. There are a couple of additional elements
21 and all of them are met beyond a reasonable doubt.

22 The first is that the defendant's been removed or
23 deported from the United States before. And that's established
24 beyond any doubt. Multiple times he has been deported from the
25 United States: March 11th, 2002; November 4th, 2011; April 4th

1 of 2018, all of these show that he was removed by flight from
2 the United States.

3 He also admitted during his statement to Agent
4 Montoya, he admitted, this is Government's Exhibit 10A: "Have
5 you ever been ordered deported, excluded or removed from the
6 United States?"

7 "Defendant: Yes.

8 "Did that occur after a hearing before an immigration
9 judge?

10 "Yes.

11 "And to what country were you deported?

12 "El Salvador.

13 "After you were ordered deported or removed, were you
14 removed by the immigration service or did you leave the United
15 States voluntarily?

16 "No, I was removed."

17 So there's no question based on the documents and
18 based on his own admission that he has been removed from the
19 United States.

20 There's a second question on the verdict form and it
21 will ask you, do you find that the defendant was deported after
22 December 18th of 2015. And the answer to that is yes. Here is
23 the document showing that he was removed on April 4th of 2018,
24 and that's after December 18th of 2015.

25 It's got his name. His A-file number. His

1 photograph. It shows that the departure was witnessed by a
2 deportation officer. This was the one document that Ms. Hogue
3 said there's not enough in this fingerprint for me to make a
4 comparison, but that does not in any way impact this removal.

5 For instance, on the removal document you see a
6 signature of the alien being fingerprinted. You can see that
7 signature. That's on the document. And then on the
8 fingerprint card that Ms. Hogue said she could compare from
9 August 10th, the same exact signature from the same person is
10 on those two documents, and also, by the way, his picture is on
11 both of them.

12 So it's very clear that even though that fingerprint
13 was not -- too poor of quality, it's very clear that that was
14 the same person. It is Mr. Cabrera. You can see the
15 photograph. He was removed after December 18th of 2015.

16 Fourth element, that he had no consent. There's no
17 question. The A-file custodian's testimony, he said he
18 searched the A-file. He searched the databases and there was
19 no evidence of an I212 form being filed. No evidence that an
20 I212 form request had been granted. None of that.

21 The defendant's admissions, he said I don't have
22 papers to be here. He admitted that to Agent Cisneros and the
23 defendant's actions, again, if he had permission, why would he
24 enter at Yogurt Canyon.

25 All right. The final element for both counts and it

1 is specific intent to enter the United States free from
2 official restraint.

3 The defendant has disputed this, but ladies and
4 gentlemen, it's not disputed. It's not in dispute. It is
5 proven beyond a reasonable doubt.

6 Judge Burns has given you the instruction on this.
7 Review that instruction, follow that instruction. Free from
8 official restraint means that the defendant had the intent to
9 enter the United States without being detected, apprehended or
10 prevented from going at large within the United States and
11 mixing with the population.

12 In other words, he wasn't trying to get caught. He
13 was trying to get into the United States to find work, for
14 instance. And there are various reasons why we know that this
15 is true. That his intent was to be free in the United States.
16 He wasn't trying to get caught, the defendant's place of entry,
17 five miles away from the nearest port of entry in Yogurt Canyon
18 where visibility for border patrol is poor.

19 You heard about that canyon near Border Field State
20 Park with ample opportunity to hide. We heard about the thigh
21 deep marsh and shrubs and things like that that individuals can
22 hide in in that area across from Imperial Beach in the
23 distance. And Agent Cisneros said, once someone reaches
24 Imperial Beach, it's very difficult to apprehend individuals
25 once they reach that point.

1 Defendant crossed in this location by design. It was
2 because it gave him an opportunity to go freely into the United
3 States. Consider also his effort at the entry. He first
4 climbed through brush. You can see the exhibits that the
5 defendant himself admitted, the brush on the Mexico side
6 leading up to Yogurt Canyon, the fence there, he went through
7 all of that extensive brush just to even get to the fence.

8 MR. DUDANI: Objection, facts not in evidence.

9 THE COURT: No, overruled.

10 MR. MCDONALD: Then he climbed that large fence
11 complete with barbed wire on the top. Then he climbed that
12 steep and large hill. He would not do these things if he was
13 simply trying to go into custody.

14 There's a lot easier ways to go into custody than what
15 he did. He was not trying to go into custody. He would choose
16 an easy place right next to a border patrol agent to go into
17 custody if that's what he intended.

18 Here's that barbed wire and there's that steep hill.

19 What did he not do? Well, another reason, his actions
20 after entry show that he intended to be free from official
21 restraint. And let's first consider what did he not do?

22 Well, he didn't walk towards border patrol. He didn't
23 try to attract attention in any way. When he gets to the top
24 of that hill, he's made it. If he's trying to get caught, here
25 I am. Come get me. Come find me. I'm here. But he didn't do

1 that.

2 Never on that video did he wave. Never did he do
3 anything like that. He didn't walk -- he didn't walk towards
4 Agent Cisneros, his vehicle down towards the left towards the
5 ocean. He didn't do that. He didn't yell for help. He didn't
6 do any of that.

7 He didn't claim he was coming to go into custody
8 during his conversation with Agent Cisneros. He didn't claim
9 he was coming to seek asylum or anything like that. He also
10 didn't sit down on the nice guardrail after he had come up that
11 big long hill and he was really tired, there's that guardrail
12 right there. If he wanted to get caught, perfect place to sit
13 down and wait for someone to drive by.

14 What did he do? Well, let's watch the video.

15 You can see him actively crawling to come up this
16 hill. You see the hill on the right side of the screen.
17 That's a steep hill, that's a hard hill to climb. And you'll
18 see that Mr. Cabrera, he gets tired. He gets tired.

19 Here he is standing up, this is at 6:48 around 37
20 seconds of the time stamp. One, two, three, four, five, six,
21 seven, eight, nine, 10, 11, 12, 13, 14, he's in one place.

22 He's tired because he's coming up that hill, he just
23 climbed a fence and now he's coming up a hill, he's tired, as
24 anyone would be climbing up that fence.

25 He continues coming up this fence and, like I said, in

1 this entire video, he never tries to seek attention. He never
2 does that, which if he was trying to go into custody, isn't
3 that what he would do?

4 We're just going to watch a small portion of this
5 video, again, here you'll see he makes several additional
6 stops. Here he is, he's standing there, one, two, three, four,
7 catching his breath.

8 He continues heading north into the United States
9 towards that secondary fence. Here he is taking another break.

10 And he gets -- he finally gets to the guardrail. He's
11 at the guardrail. You can see it on the picture on the bottom
12 right, and what does he do at the guardrail? He skips right
13 over it. He gets up and he walks on to the road. He doesn't
14 sit there. That would be a great place for him to sit.

15 And look what he does now, he's walking towards the
16 fence and then he turns east, he turns east and he walks east,
17 probably about 20 feet or so. He's walking. He's eyeballing
18 the fence. He's considering how he's going to make further
19 entry. And then what does he do? He goes right up against the
20 crevice, the two-foot, juttied-out portion of the fence, the
21 place in this exposed area.

22 He knows he's exposed now. He's on this road. He's
23 exposed. So what does he do? He goes east. Why doesn't he
24 just go straight ahead to the fence and sit down right there?
25 Why doesn't he sit down in the middle of the road? No, he goes

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1 to the one place in this strip of road that gives him some
2 cover, cover from the east at least. He needs to catch his
3 breath. He needs to catch his breath.

4 He's just jumped a fence and climbed a really big
5 hill. The defendant's place of entry, his effort at entry, his
6 actions after entry and finally his own words. Ladies and
7 gentlemen, you should take him at his word.

8 He admitted climbing over the border fence. He
9 admitted having no papers to be in the United States. He
10 admitted that his purpose for entering the United States was
11 not to claim fear, was not to seek asylum. What did he say?
12 He said his purpose was to find work. And Agent Cisneros was
13 very clear about those statements that the defendant made.

14 He said he was about three feet away from him. No
15 difficulties understanding him and vice versa. And that the
16 defendant, in fact, made those statements.

17 You should take the defendant's word that he was
18 coming to find work. The defendant -- his intent was to be
19 free from official restraint. Consider also the instructions
20 that the Court provided to you that the United States is not
21 required to prove that entry free from official restraint was
22 the defendant's sole intent.

23 So for instance, if at the time of crossing he
24 intended to be free from official restraint but was also okay
25 with getting caught, a plan B sort of, this element is

1 satisfied.

2 MR. DUDANI: Objection, Your Honor, misstating the
3 law. That is not what purpose means and that's not what's in
4 the jury instructions that the Court approved.

5 THE COURT: Overruled. Ladies and gentlemen, be
6 guided by the Court's instructions and what they specifically
7 say.

8 Mr. McDonald, you have a minute left.

9 MR. MCDONALD: Thank you.

10 Or for instance if the defendant actually intended to
11 sneak into the country, but he changed his plans when border
12 patrol came up on him. Did he changed his plans, then? This
13 element is still satisfied.

14 There's no evidence that he was coming to get caught
15 and it doesn't make sense, just 19 months before his fear claim
16 was rejected and he was deported to El Salvador. On November
17 4th of 2019, ladies and gentlemen, he's not in El Salvador,
18 he's in Mexico, 2500 miles away from El Salvador.

19 And if he was entering to get caught, it's highly
20 likely that the same thing that happened 19 months before is
21 going to happen again and guess where he's going to get sent
22 back to. El Salvador. Doesn't make sense.

23 What does make sense, what he told Agent Cisneros
24 makes sense which is that he was coming for the purpose of
25 finding work.

1 MR. DUDANI: Objection, facts not in evidence as to
2 the last bullet --

3 THE COURT: Overruled.

4 MR. MCDONALD: A reasonable doubt is based on reason
5 and common sense, not speculation. The United States has met
6 its burden in this case as to both of the crimes that are
7 charged and we ask you to return a guilty verdict on both
8 counts. Thank you.

9 THE COURT: All right. Thank you, Mr. McDonald.
10 Mr. Dudani.

11 CLOSING ARGUMENT BY COUNSEL FOR DEFENDANT

12 MR. DUDANI: Thank you, Your Honor.

13 The government has told you this is a simple case and
14 that is actually one thing that both sides agree on. This is a
15 simple case because the disagreement between the two sides is
16 what was going on in Mr. Cabrera's head at that point that you
17 see in the video.

18 In other words, what was he trying to do? Was he
19 trying to sneak in undetected or not? Well, it's a simple case
20 because we have very good evidence to examine that.

21 We have about a 15-minute video that you have in
22 evidence that shows you exactly what he did right at that point
23 that he was inside the primary fence.

24 Now, I'm going to show you that clip, that clip that
25 you've seen a few times during this trial. But before I do, I

1 want to talk about the critical jury instruction that is going
2 to guide you in deciding this case.

3 The government talked about and Judge Burns talked
4 about this intent to enter free from official restraint
5 element. That's in both counts and that's what this case comes
6 down to.

7 And you heard that what that means is trying to avoid
8 detection, avoid apprehension, and trying to mix with the
9 population freely. In this case, get past that secondary
10 fence, go to Imperial Beach, mix with the population freely.

11 Now, I'm going to play the clip. I know I'm up here
12 talking to you but I'd like you to pay attention to the clip
13 when I play it. We're going to watch it together and we're
14 going to watch it through the lens of this jury instruction and
15 we're going to see where there's evidence of avoiding
16 detection, where there's evidence of avoiding apprehension,
17 where there's evidence of trying to mix with the population
18 freely.

19 Mr. Davis, maybe you can help me out there. Thank
20 you.

21 Let's start with that first one. Is Mr. Cabrera
22 trying to avoid detection in this clip. Well, you heard what
23 Agent Cisneros told you yesterday. You heard him tell you that
24 it's a brushy hill that he's on right now. It's a brushy hill
25 and there's a depression here and this area causes a problem

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1 for border patrol. It's harder to see people.

2 You are seeing Mr. Cabrera walk straight out of that
3 area on to the exposed border patrol road. You don't have to
4 take my word for it, you have the video.

5 And that's what Agent Cisneros told you, that he is
6 walking straight up that hill, that he is not hiding, that he
7 is not hiding in any of the bushes, he's not hiding in any of
8 the brushy areas, and you're going to see that he is walking to
9 the lighter point. That's what the black and white is
10 indicating, he's walking out of the darkness to the highest
11 point in the light on an exposed border patrol road.

12 This is not what it looks like when someone is trying
13 to avoid detection. They don't walk straight to the highest
14 possible point on an exposed road and that's what we're seeing
15 Mr. Cabrera do. He's continuing to walk. He's still not
16 hiding. He's still not avoiding detection or trying to,
17 rather.

18 Next we're going to talk about that second part of
19 official restraint, avoiding apprehension, is he trying to
20 avoid apprehension? Well, what we're watching is happening in
21 daylight. He's wearing a bright orange tee shirt, and you
22 heard Agent Cisneros explain to you that there's long stretches
23 of the border that are just desert and wilderness. You have
24 that map in evidence.

25 This is in busy urban Tijuana. This is just north of

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1 that, there are several buildings right there. There are
2 houses with backyards right up against that primary fence
3 that's just south of him. This is not what it looks like when
4 someone has a plan to enter the United States, walk up in broad
5 daylight in a bright tee shirt, go to a public border patrol
6 fence -- road, exposed border patrol road, and just sit rather
7 than going in the desert, in the wilderness, anywhere else.

8 Now he is walking to the secondary fence. The
9 government is telling you that it's evidence that he is trying
10 to sneak in undetected and mix freely with the population, that
11 he takes a few steps east.

12 Where Mr. Cabrera is sitting right now is the most
13 natural place in the world to sit if you're in that location.
14 He takes a few steps east and he sits down in that 18 inches
15 where there's a natural backrest and you're not going to see
16 any attempt to mix freely with the population. You heard Agent
17 Cisneros tell you, there's no rope, there's no ladder.

18 And Agent Cisneros said, well, he sees that a lot,
19 ropes and ladders, but sometimes also if people are adept at
20 climbing, that's the word he used, if people are really good
21 climbers, sometimes they can do it without that. And he said
22 that it takes about less than a minute.

23 The government is asking you to believe that it would
24 take him less than a minute at this point to climb over that
25 secondary fence somehow, I suppose because he's an adept

1 climber, and he doesn't do it. He sits for seven minutes. He
2 could do it seven times over but he chooses to sit.

3 And there's something you can infer about Mr. Cabrera
4 just from this video and what you know about him. You know
5 he's from El Salvador. You heard from Agent Cisneros that he's
6 2500 miles from home. And you know that he just found a way to
7 cross over the primary fence and is in-between the two fences.

8 You can infer from all that that Mr. Cabrera is a
9 desperate man. I don't think there's any dispute there. He's
10 a desperate man.

11 The government is asking you to believe that a man so
12 desperate that he came 2500 miles from El Salvador to sneak
13 into the United States chooses to sit down for a period seven
14 times longer than would be necessary to cross the fence because
15 he's winded. He's tired. He wants a rest. That can wait till
16 later.

17 I'm at the gates of the United States. I've come 2500
18 miles, but I'll take a breather. That does not make sense.
19 That 's not what you're seeing in the video. The video is the
20 best evidence in this case. It shows you what actually
21 happened and there's no attempt at sneaking in.

22 So we've seen the video. We've seen it several times
23 and we've seen that there's absolutely no indication of
24 sneaking in, just the opposite, the exact opposite. But the
25 other circumstances all point in the same direction and I've

1 talked about these.

2 That photo on the right that's admitted in evidence,
3 you'll have that with you in deliberation, that's the view from
4 the bottom of that short steep slope that Mr. Cabrera walked
5 up.

6 What is the plan there? How is he going to enter the
7 United States, cross that fence and mix freely with the
8 population? Does that make sense that this is the plan to
9 sneak into the United States in daylight, in this place.

10 This is an area with heavy border patrol surveillance.
11 Agent Cisneros told you that multiple times, heavy border
12 patrol surveillance.

13 He told you that helicopters are often seen right
14 there in the area just north of the secondary fence. You have
15 photos in evidence, multiple border patrol vehicles right
16 there. It's common sense. It's a border patrol road
17 in-between the fences. Obviously there's going to be border
18 patrol surveillance.

19 The circumstances all point to what the video shows
20 you. He's sitting down and waiting to be arrested. He's not
21 taking a breather.

22 Why? Why is he doing that? You can see on the video
23 he's waiting to get arrested but why?

24 Well, you can infer based on the evidence that you
25 heard yesterday. Now, you heard a few things. You heard that

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1 he applied for asylum in 2018. And you heard that that claim
2 was rejected. The decision was made that it didn't meet the
3 legal requirements of asylum, but I want to explain a very
4 important point that may have gotten lost in all the testimony.
5 Mr. Cabrera was found credible in that process.

6 The asylum officer found him credible. That means
7 they believed him. He said, I have a fear of returning to El
8 Salvador and they believed him that he did. They found him
9 truthful in what he said. But they concluded it didn't meet
10 the legal requirements, all the technical legal requirements
11 for asylum.

12 Now, you heard Agent Alexander tell you yesterday that
13 immigration law is very complicated, that even these veteran
14 experienced border patrol agents only know small parts of
15 immigration law. I don't blame them, believe me. It is very
16 complicated.

17 Whether his claim met all the technical legal
18 requirements for asylum is not nearly as important as what's in
19 his mind for this case. Right? That's what you're deciding
20 today, what's in his mind.

21 And you know he applied for asylum and the asylum
22 officer believed him when he said, I have a fear of returning
23 to my home country. So you know he has a fear of returning to
24 his home country, and you know some other things.

25 Agent Cisneros told you that in November 2019 when

1 this happened, there was a policy in place called Remain in
2 Mexico. And Agent Cisneros told you that the new thing in
3 introduced by this policy is that if you apply for asylum at
4 the port of entry, you have to remain in Mexico while that
5 claim is being processed.

6 Now, Mr. Cabrera is from El Salvador, 2500 miles from
7 home. The program's called Remain in Mexico but we know
8 specifically he was in Tijuana. It's easy to see why someone
9 in that position, why it's a difficult position for someone
10 like Mr. Cabrera to be in. This is in Tijuana, a city we're
11 all familiar with. He's a foreigner there. He's from
12 thousands of miles away.

13 And it's important context when you consider, well,
14 why would he choose to go about it this way. The answer is he
15 wanted asylum without remaining in Mexico, and you know that he
16 knows you can apply after being taken into custody in the
17 United States.

18 He knows that turning yourself in is a way of getting
19 your asylum claim heard because that's what happened in
20 2017 --

21 MR. MCDONALD: Objection, Your Honor, misstates the
22 testimony. He didn't turn himself in.

23 MR. DUDANI: I can clarify.

24 THE COURT: Go ahead, Mr. Dudani.

25 MR. DUDANI: What happened in 2017 is that he was

1 asked, do you have a fear of return, you know, after being
2 taken into custody, he was asked, do you have a fear of return.
3 He said yes, and then his asylum application was heard.

4 So I want to be clear about what exactly you're
5 deciding today and what exactly you're not. You're not
6 deciding today whether he gets to stay in the country. That'll
7 be up to the separate immigration system. That's not being
8 decided today.

9 You're deciding today whether he was trying to sneak
10 into the country or whether he was turning himself in. The
11 government is accusing him of two federal felonies based on
12 trying to sneak in and you know he didn't do that because you
13 have the video and that's the only thing you're deciding today.

14 I understand also that many of you may feel that it
15 would have been better for him to go to the port of entry, it
16 would have been better to go to the port of entry, apply for
17 asylum there, rather than turn himself in and do it this way.

18 That's fine. That's fine. You can believe that,
19 that's fine. That's not what we're deciding today either.
20 Because, again, the accusation is that he was not turning
21 himself in. He was trying to sneak in undetected and you know
22 with your own two eyes that's not what happened.

23 I want to talk about a very important jury instruction
24 you just heard, which is that Mr. Cabrera is presumed innocent
25 unless the government proves beyond a reasonable doubt that

1 he's guilty of every element.

2 It's the highest standard in the legal system. And it
3 means, you know, if he's possibly guilty, that's not beyond a
4 reasonable doubt, even if he's probably guilty, more likely
5 than not, even that wouldn't suffice to be proof beyond a
6 reasonable doubt.

7 What does that mean more concretely? I'll try to give
8 you an example because, in daily life when we're making
9 important decisions, we apply a standard something like proof
10 beyond a reasonable doubt.

11 I'll give you a very clear example. Imagine you're
12 going sky diving and you're about to take the plunge and then
13 someone presents you with a reason to think that maybe the
14 parachute is not going to work.

15 You will suddenly become an expert in that standard of
16 proof beyond a reasonable doubt. You are going to look into
17 that. You are going to take a critical eye. And even if
18 you're persuaded that probably the parachute will be fine,
19 you're not going to accept that if there's a reason to doubt.

20 That's the same critical eye that the law instructs
21 you to take on every single element today.

22 So let's go back to that question, is there proof
23 beyond a reasonable doubt that he was trying to sneak in
24 undetected? Of course there isn't.

25 I want to address a couple of the government's

1 arguments, because the government needs to persuade you,
2 despite that video, where you can see for yourself that he's
3 waiting to get arrested and making no attempt to move past that
4 secondary fence. The government needs to find a way of
5 persuading you anyway.

6 So they have put a lot of weight on a couple of things
7 that I want to address. Number one, they're asking you to
8 convict Mr. Cabrera largely because of the statement he made
9 that he was here just for work, that's how Agent Cisneros put
10 it. He said he was here just for work.

11 Of course he's here to work. Asylum seekers come here
12 to live full, regular lives, just like all of us with the
13 benefit of the safety of this country. Asylum seekers come
14 here to have families, to work, to have normal lives.

15 Of course he's here to work. He doesn't expect to get
16 handouts for the rest of his life. Everyone needs to work. He
17 wants to do so with the safety and security that this country
18 affords us.

19 You heard Agent Cisneros tell you that the border
20 patrol is policing the border from drug smuggling, from
21 terrorism. It's a very natural thing to say, I'm here just for
22 work. I'm not causing trouble. I'm here just for work.

23 Remember what Agent Cisneros told you. These
24 interactions in the field as he put it do not typically include
25 questions about asylum. He talked to you all about his

1 standard immigration inspection, that's what he called it, and
2 he said, yeah, it's not my job in the field to ask about
3 asylum, to ask about a fear of return.

4 And Mr. Cabrera knows that. Again, you saw that 2017
5 interview and he's asked, do you have a fear of return. He
6 said yes. It was misrecorded, but you heard the agent clarify,
7 he said yes. That wasn't out in the field. That was after
8 being taken into custody.

9 Agent Cisneros didn't ask Mr. Cabrera, do you have a
10 fear of return? Are you seeking asylum? Because that's not
11 what happens in the field.

12 And so all the weight the government is putting on
13 that one sentence is absolutely nothing about that that
14 suggests that he's trying to sneak in undetected when you see
15 that's not what he's trying to do and when you have all the
16 background on him as an asylum seeker.

17 I want to address another point that the government
18 made today which is that he didn't wave down border patrol. He
19 didn't yell asking for help. Why would he do those things?
20 He's sitting on a border patrol road, perfectly exposed. You
21 can see in the video, he's facing west. The car is coming in
22 his direction. There's nothing on that road but him and the
23 border patrol vehicle.

24 There's no reason to wave. The car is coming.
25 Remember what Agent Cisneros told you. When he was driving to

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1 Mr. Cabrera, there was no attempt to hide. There was no
2 attempt to run. He was sitting there content because he had
3 achieved his goal. He was about to be taken into custody.

4 The government's theory of this case is that
5 Mr. Cabrera is so desperate to sneak into the United States
6 that he picks the perfect location. I've already told you this
7 is far from the perfect location, but this is what the
8 government is telling you today.

9 The government's theory is that Mr. Cabrera plotted,
10 found the perfect location, had this plan, 2500 miles from
11 home, committing two federal felonies, and just decides, I'm
12 tired. I'll wait. I'll just wait. And that does not make
13 sense. In this case, you need to trust your own two eyes.
14 It's a simple case. You have the video. He's not avoiding
15 detection. He's not avoiding apprehension.

16 There is no attempt or conceivable plan to mix freely
17 with the population. Mr. Cabrera is not guilty.

18 THE COURT: Thank you, Mr. Dudani.

19 Mr. McDonald, you've actually hit the 20 minutes, I'll
20 give you two, two additional minutes, so speak quickly.

21 REBUTTAL CLOSING ARGUMENT BY COUNSEL FOR THE GOVERNMENT

22 MR. MCDONALD: There's no doubt in this case that the
23 defendant is guilty. You know what someone intends based on
24 what they do and what they say. And what Mr. Cabrera did and
25 said proves his guilt beyond a reasonable doubt.

1 The defense actually admits and embraces that he did
2 tell Agent Cisneros that his purpose was coming to find work.
3 They didn't say there was a misunderstanding. They didn't say
4 something was lost in translation. They admit that he
5 came -- that he interacted with Agent Cisneros and said he was
6 coming to find work. You should believe the defendant and what
7 he said.

8 Now they say he's a desperate, desperate man coming.
9 A desperate man, if he comes, he's going to get across and he's
10 going to say, I'm here. Hallelujah. Take me into custody. I
11 made it. Take me into custody, but he doesn't do any of those
12 things.

13 This is not a desperate man. He intentionally entered
14 the United States intending to mix with the population,
15 intending to find work. You should take the defendant's word.
16 There's no reasonable doubt in this case.

17 They talked about that there's no attempt to climb the
18 fence. Well, you saw the video, he's gassed when he gets to
19 that fence, and it does him no good to try to go right up it
20 when he's worn out, when he's tired. He should stay down, stay
21 low until he's ready. All right, let's go.

22 There's the horizontal bars on the fence where people
23 can climb up they can get over it really fast, you saw that.
24 And there's no question he can climb fences because he just
25 climbed one a couple minutes before.

1 This case isn't about asylum. It's not about
2 defendant's intent from April of 2018. It's about his intent
3 on November 4th of 2019. This isn't about the backlog of
4 asylum claims from 2018 and 2019. This is about the defendant,
5 his intent to enter and that's clear, that he was coming not to
6 get caught, but to go freely within the United States.

7 There's no reasonable doubt as to the elements that
8 the United States must prove and we would ask and I'll note
9 that they did not contest any of the other elements. We ask
10 you to find the defendant guilty on both counts charged.

11 Thank you.

12 THE COURT: All right. Thank you.

13 As I mentioned folks, there's about five remaining
14 instructions having to do with deliberations. I'll give you
15 those now and I'll go over a verdict form with you which you
16 can record verdicts once you've reached them.

17 When you begin your deliberations, the first thing you
18 should do is elect one member of the jury as the -- I guess it
19 didn't work, huh.

20 Folks those who are here, you need to stay until I
21 finish the instructions. I think most of you have gotten the
22 message before, but you need to stay because it's disruptive to
23 have people get up and leave while instructions are being read.

24 If you want to come and listen to the closing
25 arguments, you certainly can do so but please spread the word

1 room for you to begin your deliberations.

2 Jury is not present. Counsel and the defendant are
3 present.

4 Both sides agree that the jury instructions, subject
5 to the objections that were made, were read as agreed upon?

6 MR. DUDANI: Your Honor, there is one point on that.

7 THE COURT: Uh-huh.

8 MR. DUDANI: The Court extemporaneously said regarding
9 the dual intent doctrine, so I know our objections were made
10 and overruled.

11 THE COURT: Yeah.

12 MR. DUDANI: That's fine. But the Court said as to
13 each count that it suffices for guilt if part of his purpose
14 was the mens rea, but I would object to that because it needs
15 to be -- there needs to be a fully formed intent.

16 Now we lost the argument --

17 THE COURT: I didn't say anything about fully formed,
18 I just said if he had a dual intent, that was still sufficient
19 as long as the government proved at the time that he entered
20 that his purpose was, his specific intent, I even used that
21 word, was to -- was to come in and go at large among the
22 public, so there was no deviation, extemporaneous or not, from
23 what the law is and what I found that the instruction should
24 say.

25 MR. DUDANI: Your Honor, can I clarify?

1 THE COURT: Yeah, sure.

2 MR. DUDANI: What the Court just said, I completely
3 agree, it's in conformity with the written instructions and we
4 had the argument yesterday. The Court did say twice as to each
5 count part of his purpose, if part of his purpose was the
6 illicit purpose.

7 THE COURT: Right.

8 MR. DUDANI: But that's -- and I would object because
9 there needs to be a full-fledged intent. It can't be part --

10 THE COURT: You're conflating things, though.

11 I mean, part of his purpose doesn't mean that it
12 wasn't full-fledged. What you're doing is saying, no, it has
13 to be his exclusive purpose to come. That's not what the law
14 is. We went over that yesterday.

15 If he has dual motives, if he says I want to come in,
16 that's one of my purposes, but if I get caught, I'm going to
17 resort to saying, well, I want asylum. That suffices as long
18 as the government proves that he had the specific intent at the
19 moment of entry to come in.

20 I didn't say anything different from that. Your
21 objection is noted and overruled.

22 Anything else then?

23 MR. DAVIS: Your Honor, I would like -- if the
24 government has anything?

25 MR. MCDONALD: Go ahead.

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
3

4 UNITED STATES OF AMERICA,)
)
5 Plaintiff,) No. 20-CR-435-LAB
)
6 v.)
) June 7, 2021
7 JUAN CARLOS CABRERA,)
) 3:48 p.m.
8 Defendant.)
) San Diego, California
9

10 TRANSCRIPT OF MOTIONS IN LIMINE HEARING
11 BEFORE THE HONORABLE LARRY ALAN BURNS
12 UNITED STATES DISTRICT JUDGE

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1 THE COURT: Okay.

2 MR. DAVIS: And the government said they weren't going
3 to introduce anything after that. So --

4 THE COURT: Okay. So that had to do with, what, a
5 post-arrest statement?

6 MR. DAVIS: Yes, Your Honor, he invoked and then --

7 THE COURT: Okay. And now -- now you're challenging
8 whether Miranda rights should have been given upon the
9 encounter with him near the fence?

10 MR. DAVIS: Yes, and Mr. Dudani is prepared to argue
11 that motion today.

12 THE COURT: All right. I'm happy to hear from you.
13 I've read the papers.

14 MR. DUDANI: Thank you, Your Honor.

15 THE COURT: Uh-huh.

16 MR. DUDANI: Your Honor, let me just start by
17 contrasting this case to most field statements. I submitted a
18 video that maybe the Court had a chance to review, and this
19 incident was captured on video.

20 THE COURT: Uh-huh.

21 MR. DUDANI: Most of the time, field statements don't
22 raise the, you know --

23 THE COURT: Custody.

24 MR. DUDANI: Don't support a finding of custody
25 because it's in the field, it's public, it's in the desert

1 or --

2 THE COURT: Custody issue.

3 MR. DUDANI: -- or it's in a vehicle.

4 THE COURT: Right.

5 MR. DUDANI: It's a roadside stop. Those are easy
6 cases. This case is very different on the facts as they
7 pertain to custody. The Court has seen the video. Mr. Cabrera
8 was hemmed in-between the secondary fence, the Border Patrol
9 vehicle, and the Border Patrol agent, all right there within
10 feet of him on -- on those three sides. That's one point.

11 Another point is that he is in a restricted area. He
12 is in-between the border fence and the secondary fence. And so
13 this is not the ordinary situation when it comes to field
14 statements, and these facts strongly support a finding of
15 custody.

16 I think there's some other important differences that
17 follow from those facts. One is in these other roadside cases
18 or in -- kind of in the desert cases, you know, there are some
19 special Fourth Amendment rules governing these border
20 interactions and part of that is motivated by the need --
21 obviously the need for the agent to determine is this an
22 immigration interaction, is this person an alien, do I have
23 probable cause to take this person into custody for that
24 reason?

25 This case is different because he's in a restricted

1 area. That alone generates probable cause to take him into
2 custody. It's not the -- it's not the typical kind of
3 immigration interaction out into the field.

4 THE COURT: Wait. You're saying anybody in proximity
5 to the fence can be arrested regardless of their citizenship?

6 MR. DUDANI: Let me rephrase that. You know, under 19
7 USC 1459, any person regardless of citizenship is prohibited
8 from entering not at a port of entry.

9 And so I do think when a person is in no man's land
10 in-between the two fences just inside the United States, it's
11 not the ordinary -- the ordinary justification is that, hey,
12 you need to do an immigration --

13 THE COURT: I agree with you. I agree. It's unusual.

14 I think once or twice I've had people walking around
15 down in these areas that it turned out to be lawfully in the
16 United States or citizens, but -- it doesn't happen all of the
17 time, but it's another thing to say just by virtue of being
18 there, without any questioning at all, that the Border Patrol
19 have authority to arrest them.

20 MR. DUDANI: Fair enough. I think another point to be
21 made about the unusual -- kind of how this is different than
22 the typical border case is that that line of cases that talks
23 about border interactions, you know, Terry stops at the border
24 being okay, those are Fourth Amendment cases, they're special
25 Fourth Amendment principles, and so most of the time it's an

1 easy case. It's clearly a Terry stop under the Fourth
2 Amendment. It's clearly not custody under Miranda.

3 There's no special exemption for the general custody
4 principles of the Fifth Amendment, even if near the border.
5 And so --

6 THE COURT: Yeah, I -- I agree with that. I agree
7 with that.

8 MR. DUDANI: And ultimately -- yeah.

9 THE COURT: But there's also likewise no prohibition
10 that prevents Border Patrol from approaching someone and asking
11 them questions if they're in the proximity of the border.

12 MR. DUDANI: I agree with that.

13 THE COURT: Without Miranda warnings. They don't have
14 to give Miranda warnings just because somebody's close to the
15 fence.

16 MR. DUDANI: I think one factor is being in no man's
17 land, but another factor is being hemmed in by a Border
18 Patrol -- by the vehicle and by the agent.

19 THE COURT: Yeah.

20 MR. DUDANI: It would not have been reasonable for
21 Mr. Cabrera to feel free to leave in the restricted area.
22 That's not reasonable to believe. And so in combination with
23 being surrounded, being in no man's land strongly supports a
24 finding of custody.

25 And I think -- I think that on these facts, the

1 custody argument is strong. And I think the closer question
2 has to do with the booking exception. And if the Court likes,
3 I can proceed to that, the booking exception, which --
4 which would -- well, let me just back up. Our position is that
5 this was interrogation and the booking exception does not apply
6 because these are questions about elements of the offense.

7 But I want to highlight for the Court that if the
8 Court does not accept that position, some of these questions
9 clearly fall outside the booking exception and also clearly
10 fall outside what an ordinary immigration inspection kind of
11 incident to a Terry stop would include.

12 There are four statements here. The first one is a
13 statement about citizenship, that he's a citizen of El
14 Salvador. Again, our position is that the booking exception
15 doesn't apply, but if the Court disagreed, that one would be
16 the kind of question substantively that's included there.

17 He doesn't have documents, and then the third -- the
18 third statement is that he climbed over the primary fence.
19 That is not necessary for an immigration inspection. That's
20 not an ordinary part of a border Terry stop, just establishing
21 alienage, lack of permission. And that's certainly not a
22 booking question.

23 The fourth statement is even clearer. The fourth
24 statement is in response to a question about the purpose for
25 coming. Why -- what's your motivation? Of course, that

1 wouldn't be supported by --

2 THE COURT: In sequence, is that the fourth question
3 that was asked after they ascertained the answers to the first
4 three?

5 MR. DUDANI: Exactly.

6 THE COURT: Okay. And what -- I'm sorry. Remind me
7 what was his answer when he was asked that?

8 MR. DUDANI: To come to work.

9 THE COURT: Okay. All right.

10 MR. DUDANI: Unless the Court has questions, those are
11 the arguments in favor of suppressing the statements.

12 THE COURT: All right. Mr. McDonald?

13 MR. MCDONALD: Your Honor, this was an excellent field
14 immigration inspection asking exactly the questions that a good
15 Border Patrol agent should ask in this circumstance.

16 THE COURT: The third one -- or the fourth one seems
17 to me problematic. By the time they've ascertained that he's a
18 citizen of El Salvador, he has no documents or permission to be
19 in the United States, he just climbed over the fence, the
20 fourth one actually goes to an element of the crime. It goes
21 to proof. It doesn't go to them convincing themselves that he
22 should be arrested. They know that after they've ascertained
23 the first three, right?

24 MR. MCDONALD: Well, not quite, because when someone
25 jumps over the fence, if they're coming to go into custody, if

1 they're coming in to go into Border Patrol custody, that's
2 something that the Border Patrol has to ascertain. There are
3 give-ups, for instance, where if they say I was coming to go
4 into custody, then they know that they're not going to
5 prosecute that case.

6 In this case, he asked him what was your purpose for
7 coming? And he said that my purpose was coming to go to work.

8 But more generally, Your Honor, there's no, you know,
9 three questions only rule for Border Patrol agents when they
10 encounter someone in the field. Berkemer v. McCarty, way back
11 from 1984, says that an officer may ask a detainee a moderate
12 number of questions to determine his identity and to try to
13 obtain information confirming or dispelling the officer's
14 suspicions. This was just basically four questions, Your
15 Honor.

16 Otherwise, the encounter itself is a traditional
17 standard Terry stop. And I'll just quote the Ninth Circuit
18 from Gutierrez-Salinas, 640 Fed. Appendix 690: "The Ninth
19 Circuit has repeatedly held that brief questioning near the
20 border is a noncustodial Terry stop that does not trigger
21 Miranda." And there's nothing about this stuff that makes it
22 any different.

23 The Court has seen the video. The agent comes up on
24 an individual up against the secondary fence and asks some
25 simple questions. He does not handcuff him, as was suggested

1 in the defendant's motion. You can see the defendant, for
2 instance, once he gets into the Border Patrol vehicle, putting
3 out his arms in a way that would not be possible to be
4 handcuffed. So this is a standard Terry stop, and all four
5 questions were -- were reasonable and appropriate within the
6 Terry stop exception.

7 MR. DUDANI: Your Honor, may I respond?

8 THE COURT: Yeah, sure.

9 MR. DUDANI: First on whether there might have been a
10 defense available about specific intent and so he had to ask
11 that fourth question, that -- even -- there was probable cause
12 to take him into immigration custody at that point.

13 So we're talking about Border Patrol at the border and
14 there's --

15 THE COURT: But this -- this Miranda warning applies
16 to criminal custody, right, not immigration custody? There's
17 no requirement to give Miranda warnings before taking somebody
18 into immigration custody.

19 And the point the government makes is, look, this
20 under Ninth Circuit law and it's kind of a crazy quilt here
21 about, you know, who has to be given warnings under what
22 circumstances -- I take that back. Not who has to be given a
23 warning. Under what circumstances a person physically present
24 without permission in the United States can be prosecuted or
25 has committed the offense implicates this official restraint

1 doctrine. And I don't disagree with Mr. McDonald that, you
2 know, to make sure that he's got probable cause to arrest, he's
3 got to assure himself that the defendant's intent -- the Ninth
4 Circuit has said this -- subjective intent was to go at large.

5 It's not just physical presence here. It's not just
6 objective. You have to ascertain the subjective intent of the
7 person. And without that, it's a complete defense to the
8 charge and it's probably -- if you know otherwise or he says
9 I'm coming to be arrested, that may cut against the efficacy of
10 the arrest.

11 That's the problem I'm having with it. It's -- it's a
12 difficult standard to deal with because, as I said, you know,
13 it's hard to get -- for lay people to get their mind around the
14 fact that, wait a minute, he jumped over the fence, his feet
15 are here in the United States, what part of enter hasn't he
16 done?

17 But we have this legal fiction that, well, if you're
18 under continuous restraint, you know, you're not in, and if
19 your intention is to turn yourself in, then you're not coming
20 in with the required intent, which is to go about at large in
21 the population, not just to turn yourself in.

22 I think under the cases, the Border Patrol -- it's
23 wise to, you know, ask that follow-up question before they
24 place somebody under arrest.

25 MR. DUDANI: Your Honor, and maybe it's wise and in

1 some broader sense appropriate for --

2 THE COURT: Well, it goes to probable cause, in other
3 words.

4 MR. DUDANI: Well, so, Your Honor, what we're talking
5 about is whether it's admissible in the criminal case.

6 THE COURT: Right.

7 MR. DUDANI: And so, you know --

8 THE COURT: Actually what we're talking about is
9 whether it's inadmissible because they didn't advise Miranda
10 warnings.

11 But you're asking me to suppress, which is at its base
12 a deterrent to the -- to the police. It punishes the police
13 and says don't do this again, we're going to deter you by
14 suppressing the statement here.

15 That's the real context of this, right?

16 MR. DUDANI: Border Patrol had probable cause to
17 arrest him, if only for an immigration purpose and -- even if
18 only for an immigration purpose, and --

19 THE COURT: Then -- then we're not -- why are we
20 talking about Miranda if it's just for an immigration purpose?

21 MR. DUDANI: Because we're talking about its
22 admissibility or inadmissibility in the criminal trial. So
23 it's not contradictory to say that, well, he had probable cause
24 as an immigration officer and didn't need to ask that fourth
25 question.

1 THE COURT: I don't know. I mean I don't -- I don't
2 know that to be true. Does -- do they have the right to arrest
3 if they believe that the person's subjective intent was just to
4 be arrested or if he's being chased by people that are going to
5 do harm to him -- can they arrest him for an immigration
6 offense? I mean if they can, that's a clear difference between
7 what's required for a criminal offense and what's required for
8 an immigration offense. So I don't understand the point.

9 MR. DUDANI: Well, I -- I think it happens all the
10 time that people are taken into immigration custody, and from
11 there, their claim that they're there in order to get arrested
12 is -- is evaluated in immigration court.

13 I -- it's not even clear to me that there wasn't
14 probable cause. I -- let me step back and address the
15 contention that the Ninth Circuit case law is clear on these
16 kinds of interactions. I don't agree and the unpublished case
17 -- the published cases that the unpublished case that the
18 government cited relies on, the published cases have exactly
19 those facts that I started contrasting this case to. Those are
20 car cases and those are kind of in the public, in the
21 wilderness, in the desert type cases.

22 And in those situations -- you know, in those
23 situations, there's a clear rationale for immigration
24 inspections that doesn't apply here, and those are akin to
25 roadside stops like in Berkemer where there is publicity and

1 you're not in a restricted area where obviously you're not free
2 to leave.

3 And -- and so -- I mean I think that also relates to
4 the point that we're talking about that that fourth question
5 was clearly unnecessary in this context, you know, in this
6 context where he's already in the no man's land where clearly
7 there's authority and probable cause to arrest him and clearly
8 the officer went outside the limited immigration inspection.
9 Maybe questions like that need to be asked in some
10 circumstances, but not -- not in this one.

11 THE COURT: All right. In the context of the -- this
12 is charged as an attempt, isn't it?

13 MR. MCDONALD: Yes.

14 THE COURT: Yeah, in the context of attempted entry
15 into the United States after being deported, the government
16 bears the burden of establishing lack of official restraint.
17 The government doesn't have to disprove speculative unsupported
18 evidence, but it otherwise does have to prove that the
19 defendant had the intention to come in and go free among the
20 populace, not some purpose just to turn himself over to Border
21 Patrol at the time.

22 And in the absence of that, the jury must find the
23 defendant not guilty where that's the issue. It's relevant not
24 just to the commission of the crime. It's relevant to probable
25 cause to arrest a person on that. So to begin with, I don't

1 find that the fourth question put to him, what was your
2 purpose, is out of bounds. I find that that is a question that
3 goes to probable cause.

4 Going back for just a second to the question of
5 whether the defendant was in custody. Miranda requires three
6 things, custody, focus, and interrogation. There's no question
7 that there was interrogation. There's no question there was
8 focus. When you find somebody close to the border like that,
9 you're homing in on a particular offense, immigration offense.
10 The question here is whether the defendant was in custody.

11 The Supreme Court has said that's a significant
12 deprivation of personal freedom. The Ninth Circuit has defined
13 it more broadly. But the Ninth Circuit has recognized that
14 these encounters to ascertain whether we're dealing with
15 somebody who has crossed in illegally or one of the weird
16 situations where some U.S. citizen or legal resident is down
17 wandering around down by the border fence makes it appropriate
18 to make inquiry. And the fact that they make inquiry under
19 those circumstances doesn't convert it into custodial
20 interrogation.

21 I've looked at the -- the video. You say, well, he's
22 hemmed in. He's no more hemmed in than when a person is
23 apprehended by two Border Patrol agents that stand on either
24 side of his egress into the United States. So the Court,
25 having reviewed the evidence here, does not find that the

1 defendant was in custody for Miranda purposes. I don't find
2 that this was custodial interrogation.

3 I find this is akin, as is -- as are most of the
4 cases, to a Terry stop where this is an encounter and the
5 Border Patrol are trying to ascertain what they have. You can
6 say, well, it looks pretty evident what you have here, but
7 until they ask the question -- and, as I said, the Ninth
8 Circuit has inserted this evidence on attempt cases that the
9 subjective intent of the defendant is part of this, and in the
10 absence of an intent to come in and go free and about in the
11 United States, the person is not guilty because they're under
12 official restraint being caught under these circumstances, very
13 close, being watched the whole time. So I think the need for
14 the Border Patrol to ascertain that his intent was to go at
15 large in the United States or go to work here is relevant.

16 So to sum up, he wasn't in custody for Miranda
17 purposes, in my judgment. And all four components of what he
18 was asked in the field statements were relevant to the
19 assessment of whether probable cause existed. The motion to
20 suppress is denied.

21 Okay. I think that's it then, right?

22 MR. DUDANI: Your Honor, I understand the Court's
23 ruling. Just very briefly, I just want to say what I should
24 have said earlier, which is that after the third question when
25 Mr. Cabrera allegedly said that he climbed over the fence,

1 there was probable cause for a violation of 19 --

2 THE COURT: I would have thought that too. But
3 subsequent case law, including case law in my own cases, have
4 said oh, no, no, it's the subjective intent that forms the
5 attempt and it has to be proved --

6 MR. DUDANI: Right.

7 THE COURT: -- and that has to be an element. And I
8 remember Judge Bybee is saying, look, we're in this unusual
9 situation now where, you know, people -- people cannot be asked
10 in some circumstances, but they must be asked, you know, if
11 they're planning to turn themselves in.

12 And I think it's incumbent on the Border Patrol to
13 distinguish, you know, those situations and to say the
14 defendant's subjective intent was to go -- be free to go about
15 in the United States as was his determination.

16 So I have your point on that.

17 MR. DUDANI: Right.

18 THE COURT: Respectfully, I disagree with you.

19 MR. DUDANI: Understood, and just to complete the
20 record, my -- my point is that there was ample probable cause
21 for a violation of 19 USC 1459 whose elements relate to failing
22 to report your arrival. Climbing over the fence itself
23 violates that statute, and so the position is that there's
24 probable cause in that --

25 THE COURT: Okay. Got you.

1 MR. DUDANI: -- and even if a Terry stop had exceeded
2 the scope.

3 THE COURT: All right. The record is complete on
4 that. The motion is denied. The statements may come in.

5 Is there anything else to resolve prior to trial now?

6 MR. DAVIS: Yes, Your Honor. I want to -- I just want
7 to front for the Court an issue that may come up tomorrow --

8 THE COURT: Uh-huh.

9 MR. DAVIS: -- about a defense witness that we intend
10 to call.

11 We don't believe that this witness is an expert, but
12 we've provided expert notice to the government in an abundance
13 of caution.

14 THE COURT: Okay.

15 MR. DAVIS: And I just want to give the -- you know,
16 give the opportunity now to tell the Court.

17 THE COURT: Yeah. No, I'd rather do it now than hold
18 the jury out.

19 MR. DAVIS: And the other reason that we may do this,
20 Your Honor, is that she -- our witness, we don't know exactly
21 when she's going to be called because we don't know how long
22 the court -- case is going to take. I know 1326 trials in this
23 courtroom often take less than a day, but --

24 THE COURT: 3:00 in the afternoon, they'll probably be
25 done.

1 MR. DAVIS: We're having her come tomorrow afternoon.
2 The question that we're going to have is if the government is
3 not done with their case tomorrow afternoon, if we could call
4 her out of order. I know --

5 THE COURT: Sure. Yeah, you can.

6 MR. DAVIS: So this witness, Your Honor, her name is
7 Erica Pinheiro. She's a legal director of an organization
8 called Al Otro Lado in Mexico.

9 THE COURT: What's the name of it?

10 MR. DAVIS: Al Otro Lado. It means the other side in
11 Spanish.

12 THE COURT: All right.

13 MR. DAVIS: Al Otro Lado. She's a -- she's an
14 American attorney who works in Mexico, lives and works in
15 Tijuana. And what we intend to call her to testify, we believe
16 that her testimony is lay testimony, fact testimony, not expert
17 testimony.

18 THE COURT: All right.

19 MR. DAVIS: To front that for you. So what we -- so,
20 big picture, Your Honor, we haven't been shy about what our
21 defense is going to be in this case. We do intend to argue
22 that Mr. Cabrera did not have a specific intent to enter the
23 United States free from official restraint.

24 THE COURT: All right.

25 MR. DAVIS: And there's evidence in the record to

1 support that. For example, you know, we're going to rely on
2 the fact that he -- I don't know if the Court has reviewed the
3 footage of him, but he comes over the fence, walks straight up
4 to the border fence, sits down and waits for about seven
5 minutes before the Border Patrol come -- you know, he's waiting
6 for the Border Patrol to come get him.

7 THE COURT: Uh-huh.

8 MR. DAVIS: And he has also applied for asylum before
9 in the past, Mr. Cabrera has. In 2018 he applied for asylum.

10 THE COURT: Has that been acted on?

11 MR. DAVIS: Yes, he was found credible, but it was
12 denied because of a -- you know, he hadn't met the evidentiary
13 burden.

14 THE COURT: Okay.

15 MR. DAVIS: But we believe that those two facts, the
16 fact that he, you know, in his most recent time in the United
17 States had sought asylum and the fact that when he crosses the
18 border and walks straight up the hill and sits down and waits
19 for the Border Patrol to come get him, allow us to argue the
20 inference that that's what he was doing --

21 THE COURT: Yeah, I have no disagreement with that.

22 MR. DAVIS: Okay. So the -- the witness that we
23 intend to call, we are going to ask her -- she's going to --
24 prepared to testify about the factual situation in Tijuana in
25 November of 2019, specifically that as a result of the migrant

1 surge that was well attested to and in the news at that time
2 and the government's policies including the remain in Mexico
3 policy and the metering policies, that there was an enormous
4 backlog of Central American migrants seeking asylum. Thousands
5 of people were waiting, long line, you know, basically no hope
6 to come in through the port of entry. And that -- this is from
7 personal experience, not from, you know, reports. This is what
8 she has seen and interacted with. And for that reason, that --
9 that many people were -- the word was that you could climb over
10 the fence and try to get your asylum application that way.

11 So we intend to offer her to put those facts before
12 the jury. They can, you know, dispute the facts --

13 THE COURT: She -- she doesn't know the defendant,
14 knows nothing of his personal circumstances?

15 MR. DAVIS: No. This is -- this is simply to describe
16 the situation at the border. We think it's probative and
17 relevant because it certainly corroborates the idea that -- you
18 know, the evidence is going to come in that Mr. Cabrera is a
19 citizen of El Salvador. The evidence is going to come in --

20 THE COURT: Right.

21 MR. DAVIS: -- that he has applied for asylum before
22 and that he walked straight up and sat down at the fence.

23 THE COURT: Right. Right. I have no problem with
24 that. I just --

25 MR. DAVIS: And so we think this corroborates --

1 THE COURT: Go ahead.

2 MR. DAVIS: I'm going to limit it. I'm not -- here's
3 the thing: I know the Court's likely concerned. I'm not going
4 to be talking about the travails and how difficult it was --

5 THE COURT: Yeah.

6 MR. DAVIS: -- and all this other stuff, and I'm not
7 going to put a sob story in front of the jury about --

8 THE COURT: Yeah.

9 MR. DAVIS: You know, I'm not trying to get into
10 politics. I'm not trying to --

11 THE COURT: Right.

12 MR. DAVIS: -- get into anything that would distract
13 the jury away from what this is. We're going to target the
14 conversation to, really, a few bullet points, which is that
15 there was a backlog of people, the line to get in through the
16 port of entry was very -- thousands of people long.

17 THE COURT: Right.

18 MR. DAVIS: And I think that corroborates the idea
19 that someone who wants to apply for asylum might try to go get
20 into custody and put their application that way. It supports
21 that inference, and that we argue the inference from those
22 facts.

23 So that's what we propose to do.

24 THE COURT: The concern I have is something else you
25 said earlier, which was the word was that you could climb over

1 the fence. Word according to who?

2 MR. DAVIS: I think that she would say she was aware
3 from -- you know, she'll lay a foundation that she -- she lives
4 in Tijuana, works in Tijuana with these populations and is
5 aware of --

6 THE COURT: That there's a rumor circulating among
7 people that the way to do this is jump over the fence, how is
8 that probative of anything?

9 MR. DAVIS: I guess what she would say is that -- that
10 she is aware that people -- that many migrants were electing to
11 try to cross the fence rather than to go through the port of
12 entry.

13 THE COURT: Well --

14 MR. DAVIS: Now, if the Court, you know --

15 THE COURT: I wouldn't want her to say what the word
16 was.

17 MR. DAVIS: Fair enough.

18 THE COURT: It's collective hearsay, but, you know, if
19 she wants to say I'm personally aware there were a number of
20 people that were unhappy with the speed at which asylum was
21 being -- but I don't know what that gets us. I mean it's not
22 like that's a legal defense.

23 Is your argument going to be that he was crossing over
24 to get his asylum claim reviewed again?

25 MR. DAVIS: To go into custody so he could apply for

1 asylum.

2 THE COURT: Okay. I mean that kind of flies in the
3 face of what he said if the proffer of the government is true
4 that he said, no, I'm coming over to work.

5 Did he mention anything about asylum?

6 MR. MCDONALD: He did not.

7 MR. DAVIS: That'll be our obstacle, Your Honor.

8 THE COURT: All right.

9 MR. DAVIS: But I think that the evidence is
10 relevant --

11 THE COURT: I think circumscribed by that, you know --
12 I don't know, I mean I'm --

13 MR. MCDONALD: Your Honor, I do have some arguments in
14 response.

15 THE COURT: Sure.

16 MR. MCDONALD: I don't think that this is appropriate
17 evidence and I think it is a tricky issue --

18 THE REPORTER: Please slow down. Please slow down.

19 MR. MCDONALD: Yes. It is -- it is a tricky issue,
20 probably better in a written motion, I think, to really flesh
21 this out, Your Honor.

22 We just were given this notice on June 2nd just a
23 couple days ago.

24 THE COURT: Yeah.

25 MR. MCDONALD: This expert notice.

1 THE COURT: Yeah. It's easy enough to conceive,
2 though. I mean either it's relevant or it's not and, you know,
3 if relevant, is there any probative danger to it?

4 Sounds pretty harmless. I don't know that it, you
5 know, backs up anything, the fact that people are jumping over
6 the fence because the lines are long, okay.

7 MR. DAVIS: Your Honor --

8 THE COURT: I mean your answer to that is not this
9 guy. Not this guy because he never said word one about asylum.
10 He said he was coming to work. So what's that have to do with
11 anything?

12 MR. MCDONALD: I think, step number one, we're missing
13 a critical link to the defendant. Unless the defendant
14 testifies that he was, in fact, coming for that particular
15 purpose, having someone come and tell the jury that some
16 unknown, unnumbered number of migrants crossed over the fence
17 in this particular area during this particular time, that opens
18 up a whole can of worms from a 403 prejudice perspective.

19 The United States then -- this -- this simple
20 immigration case would be expanded to really be a discussion
21 about the asylum procedures.

22 THE COURT: Is there a relevancy issue to begin with?
23 Is there a 402 issue?

24 MR. MCDONALD: There -- there is a relevancy issue I
25 think, unless -- unless there's a link to the defendant.

1 Unless he testifies that that's my --

2 THE COURT: That's the problem I'm having, Mr. Davis.
3 You know, if he's going to say, look, my purpose -- I know what
4 I said to the agent or I didn't say it to the agent, whatever
5 he wants to say, but my purpose was to get asylum, then I can
6 see this as corroborative evidence. But in the absence of
7 that, you're saying, well, because other people did it, that
8 must have been his purpose, and that doesn't follow.

9 MR. DAVIS: No, Your Honor, I disagree. First of all,
10 the defendant doesn't have to testify for us to -- to argue
11 inferences. This is the case United States versus Rahm. It's
12 993 F.2d 14 --

13 THE COURT: Yeah, but where -- you're pulling this,
14 the concept of asylum, out of the sky. Without some historical
15 underpinning that the defendant was trying to get asylum this
16 time, which is contrary to what they say he said, then, you
17 know, we're just pulling some concept out of -- out of the sky
18 and trying to impute it in this case.

19 MR. DAVIS: I disagree, Your Honor. He applied for
20 asylum in 2018.

21 THE COURT: But it was denied.

22 MR. DAVIS: Right. But he can still apply again.

23 THE COURT: Well, he can, but that doesn't -- that
24 doesn't prove that was the reason he came across.

25 MR. DAVIS: It's an inference, Your Honor.

1 THE COURT: Yeah.

2 MR. DAVIS: We're allowed to argue inferences from
3 evidence --

4 THE COURT: I don't --

5 MR. DAVIS: And this case says that we -- the
6 government's allowed to do -- to argue inferences from
7 circumstantial evidence. The case of Rahm says --

8 THE COURT: But there's no question --

9 MR. DAVIS: -- that the defendant does not have to
10 testify --

11 THE COURT: Mr. Davis, there's no question that you
12 can allow inferences from circumstantial evidence.

13 The question is whether this is relevant evidence.

14 MR. DAVIS: Right.

15 THE COURT: And in the absence of -- of some proof
16 that his purpose -- you know, from him or otherwise, that his
17 purpose was to reapply for asylum, then her testimony doesn't
18 make any difference. She's -- she doesn't know him. She's
19 saying that a lot of people cross over to apply for asylum.
20 Well, that doesn't mean it's him.

21 MR. DAVIS: I disagree, Your Honor. I think it's
22 relevant because we are able to argue an inference from his
23 prior -- the Court has already agreed with this, that we can
24 argue an inference from his prior application --

25 THE COURT: No, no, I haven't agreed with that. I

1 haven't agreed with that. What I've agreed with is that you
2 can argue an inference that arises from circumstantial
3 evidence, but the fact that he crosses over doesn't raise a --
4 does not amount to circumstantial evidence of what his purpose
5 was.

6 MR. DAVIS: That plus the prior asylum application.

7 THE COURT: It was denied, though. It was denied.

8 MR. DAVIS: That doesn't matter, Your Honor. The
9 question is not whether he has a likelihood of being granted.
10 The question is whether we can argue -- the jury could believe
11 that one reason -- the reason that he came across and sat down
12 and waited for the Border Patrol to come get him was because he
13 didn't want to wait for a line for six months in Tijuana with
14 thousands of other people.

15 THE COURT: Now you're imputing to him something that
16 she cannot possibly say.

17 MR. DAVIS: I'm not --

18 THE COURT: He hasn't said that. It would be entirely
19 speculation to argue that was his motive without his testimony
20 that was my motive.

21 MR. DAVIS: I disagree, Your Honor. I think the Ninth
22 Circuit case law is very clear on this, that we do not --

23 THE COURT: All right. I don't think it is. I find
24 it's not relevant. I'm not going to allow it. Absent him
25 testifying that his purpose was to apply for asylum, then

1 that's corroborative evidence, but in the absence of that, just
2 to grab something out of the sky and say, well, a lot of people
3 cross for this reason, that must be his reason and the fact
4 that he'd applied for asylum before and been denied, I don't
5 think that that necessarily is evidence of what his reason was
6 on this occasion. And then you're up against the fact that he
7 said, according to them -- didn't mention word one about
8 asylum -- said I came here to work.

9 MR. DAVIS: That's their case, Your Honor. That's the
10 government's burden that they're going to try to prove. Our
11 argument --

12 THE COURT: I -- I understand. I'm just saying
13 there's not a link between her testimony and this defendant or
14 anything that happened in this case. The motion to exclude her
15 is granted.

16 You have your objection to it. You've made your
17 record.

18 MR. MCDONALD: Your Honor, with regard to the
19 defendant's prior asylum application, that is also not relevant
20 for purposes of this case.

21 THE COURT: No, I -- I agree. I don't think we're
22 going to get into that at all. I mean I just don't see it. So
23 I agree.

24 MR. DAVIS: I'm sorry, I missed that. What was the
25 point that --

1 THE COURT: He says he doesn't think the prior asylum
2 application and what happened on that is relevant. I agree
3 with him.

4 MR. DAVIS: Your Honor, the Court is excluding our
5 entire defense. All right. We --

6 THE COURT: No, no. You can -- you can argue that,
7 look, given his proximity to the fence, the fact he sat down
8 for seven minutes, the fact that he wasn't running away, that
9 his purpose was to turn himself -- turn himself in.

10 MR. DAVIS: Right. But we have to be able to tell the
11 jury why he might do that, right? And we don't have to tell
12 them -- he doesn't have to testify and say I did this. I'm
13 allowed to argue inferences from the evidence, so I can say,
14 look, the fact that he's from El Salvador, has applied for
15 asylum before, walked straight up and sat down, and thousands
16 of people were waiting to get in through the port of entry and
17 coming over the fence, that -- you can infer from that evidence
18 that this is what he did in this case.

19 THE COURT: Yeah, I -- I just don't --

20 MR. DAVIS: Now, is it a strong inference? Can the
21 government rebut it? Sure, they can. They can try to with
22 their evidence. But the Court -- this is -- Your Honor, if the
23 Court is going to exclude this, this is violating our right to
24 a defense under the Constitution. I mean the Constitution --

25 THE COURT: No, I don't agree with you, Mr. Davis.

1 Look, I'm very mindful of that, and -- and I usually bend over
2 backwards if there's some basis for it, but this is entirely
3 speculative. It has nothing to do with showing what this
4 fellow's intent was.

5 The fact that other people are climbing over because
6 the word out according to this lawyer is that you can get
7 asylum that way or get -- that has nothing to do with this
8 fellow. You know, nothing at all.

9 I mean, if it was true and inexorable that everybody
10 coming over the fence was applying for asylum, maybe. But
11 that's not what she's going to say.

12 MR. DAVIS: That's not what we're arguing, Your Honor.
13 And if the Court's concerned about --

14 (Discussion off the record.)

15 THE COURT: Go ahead, Mr. Davis.

16 MR. DAVIS: I understand what the Court is saying.
17 What I'm -- the point that I'm trying to make, Your Honor, is
18 that if the Court's concerned about this thing about the word
19 out and what other people are doing, then that's fine. I don't
20 have to put that in. But I think the facts on the ground that
21 there was a line of people trying to get in through the front
22 door and that line was several thousand people long and that
23 the wait in Mexico was taking forever to come in is admissible,
24 relevant evidence that I can raise -- that I can argue to the
25 jury you can infer from this evidence that that may be a reason

1 that he was coming in, and that coupled with the fact of his
2 prior asylum application, it gives a motive for why he would
3 come in and turn himself in to the police.

4 Because otherwise, what's the motive, right? Why does
5 he come and sit down and wait for seven minutes sitting on a
6 road in plain view of everybody as they drive up and come to
7 him? We're going to point that out and we're going to say he
8 came in with intent to enter free from official restraint.

9 THE COURT: How are you going to --

10 MR. DAVIS: You can't tell --

11 THE COURT: How are you going to prove that one can
12 reapply for asylum?

13 MR. DAVIS: I'm going to get it from the A-file
14 custodian.

15 THE COURT: Okay.

16 MR. MCDONALD: And, Your Honor, I think that would be
17 beyond the scope of the examination of the A-file custodian.

18 THE COURT: Well, then he can call him as his own
19 witness. I mean the A-file custodian will say somebody can
20 reapply for asylum?

21 MR. MCDONALD: I don't -- I don't know exactly what he
22 will say, but, Your Honor, I think --

23 THE COURT: I'll -- I'm going to change the ruling.
24 I'll permit you to prove that he applied previously for asylum
25 and it was turned down, and I'll permit you to prove through

1 the A-file custodian that one can reapply for asylum. And you
2 can argue the circumstances, the physical circumstances, in
3 evidence pertaining to this defendant, that he came in, sat
4 down by the fence, and waited. And you can argue that.

5 I'm not going to allow the woman to testify about what
6 others have done or what the condition on the ground was. So
7 that's the ruling.

8 MR. DAVIS: I've given up on what others have done,
9 Your Honor. You know --

10 THE COURT: Yeah. Otherwise --

11 MR. DAVIS: I'm not going to --

12 THE COURT: Otherwise, she doesn't provide anything
13 that's relevant, as far as I'm concerned, to this. So that's
14 my ruling. I don't want to belabor it.

15 She may not testify. I will permit you to prove that
16 he had previously applied for asylum and that one can reapply.
17 And, you know, maybe that's relevant to the -- the physical
18 circumstances of him sitting down by the fence and remaining
19 there.

20 MR. DAVIS: Is the Court precluding all testimony
21 about the situation in Tijuana in November of 2019, about the
22 thousands of people waiting to come in and the long line at the
23 border? Because I can inquire that of the A-file custodian as
24 well.

25 THE COURT: Yeah, okay, I'll let you do that way.

1 MR. MCDONALD: Your Honor, I have an additional issue
2 with the asylum claim from previously, and it is this: That
3 when he made that asylum application, it was actually after he
4 had illegally entered the United States, and he pled guilty to
5 illegally entering the United States and was in custody at the
6 time that those credible fear claims --

7 THE COURT: I assume all of this can be elicited from
8 the A-file custodian, right?

9 MR. DAVIS: I think that all goes to weight, Your
10 Honor.

11 THE COURT: I do too.

12 You can -- I'm not foreclosing you from proving any of
13 that. But I think there is a -- you know, there's a thread of
14 relevancy to the fact that one can reapply, this fellow has
15 applied before, and then you look at his conduct, you can say,
16 well, that might have been his motive, and even though, you
17 know, he disclaimed that, he didn't say anything about it at
18 the time. But that's how it shapes up.

19 The -- the lawyer, with all respect to her, I don't
20 find has any relevant testimony to this case. And as you say,
21 Mr. Davis, you can inquire of the agent what the circumstances
22 on the ground were at the time that he entered and that there
23 was a big pileup of people trying to get asylum.

24 I'll let you do that.

25 MR. DAVIS: Thank you, Your Honor. And as to the

1 asylum application, just to let the Court know, I'm not going
2 to inquire about any of the merits or the facts of what he was
3 claiming or anything like that.

4 THE COURT: Right. Okay. That's fine.

5 MR. DAVIS: I'm just going to go the fact that he
6 applied --

7 THE COURT: So those -- those are the parameters then.
8 You can call her off.

9 Okay. Anything else?

10 MR. MCDONALD: Your Honor, with regard to the asylum
11 application, would the United States be permitted to get into
12 the substance of it to show that --

13 THE COURT: Why? I mean the only relevance is he's
14 saying that this fellow applied before and one is not
15 foreclosed from reapplying, and if you look at this guy's
16 behavior, it looks like that's what he wanted to do because he
17 sat down. He didn't try to make a run for it. He didn't try
18 to get over the second fence. Those are fair inferences, and I
19 don't want to completely deprive him of a defense.

20 He's -- he's right, you know, there's some relevance
21 to that. The woman, no, she doesn't have any historical
22 connection. She knows -- doesn't know this fellow, doesn't
23 know what his motives were. So I'm not going to allow
24 testimony that the word was that if you jump over the fence --
25 the word from whom?

1 MR. MCDONALD: Your Honor, my -- my concern is that
2 the jury will hear El Salvador and asylum request and really
3 run away with their own imagination in terms of what that looks
4 like.

5 THE COURT: You're going to be able to prove that his
6 -- whatever his claims were, without regard to specificity,
7 that he presented them and an immigration judge said, no, and
8 he was legally put out.

9 That's all we need to know. We don't need to get into
10 the weeds on this. Look, that's it. We've thrashed this
11 around. Those are my rulings on this.

12 Tomorrow at 9:00 I'll see you downstairs.

13 MR. DAVIS: So -- okay. So tomorrow we're meeting
14 downstairs in the jury lounge.

15 THE COURT: In the jury assembly room.

16 MR. DAVIS: At 9?

17 THE COURT: Yeah, at 9. Be ready to go. We'll pick a
18 jury. And how many witnesses do you have?

19 MR. MCDONALD: Four.

20 THE COURT: Okay. So your evidence, if you intend to
21 present affirmative evidence, I don't know, maybe Mr. McDonald
22 will let you handle this asylum thing while the witness is on.
23 Otherwise, you can recall him, put him on as your
24 case-in-chief. But be ready to go in the afternoon.

25 MR. DAVIS: We will.

1 THE COURT: My experience is, around 2:30 or so, we're
2 usually ready to go with the defense, which means you'll also
3 have to argue -- which means we'll probably take up jury
4 instructions over the noon hour.

5 MR. DAVIS: Yes, Your Honor. I have mine ready to
6 file. I just haven't filed them yet. I'll file them tonight.

7 THE COURT: File them. File them.

8 MR. DAVIS: There won't -- there's only one or two.
9 They're not going to be very different from the normal ones.

10 THE COURT: All right. See you tomorrow morning.

11 (The proceedings concluded at 4:55 p.m., June 7, 2021.)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE LARRY A. BURNS)

United States of America,	) <u>Case No:</u> 20cr-0435-LAB
)
Plaintiff,	) Mr. Cabrera's Proposed Jury
vs.	) Instructions
)
Juan Carlos Cabrera,)
)
Defendant.)

I.

Introduction

Mr. Cabrera hereby submits his proposed non-standard jury instructions, although he reserves the ability to supplement them as necessary based on the evidence at trial.

1 **II.**

2 **Proposed Modified Instructions**

3 Mr. Cabrera proposes the following additional instructions. Some are slightly
4 modified Ninth Circuit model instructions; others are sourced in case law or in use in
5 other jurisdictions.

- 6 1. Circumstantial evidence *CALCRIM 224 (2017)*
7 2. Elements of the offense *Ninth Cir. Jury Instr. 9.7 (as modified)*
8 3. “Intent to enter free from official restraint”
9 4. Defendant has testified – with a felony conviction
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Defendant's Proposed Instruction No. 1

Circumstantial Evidence: Sufficiency of the Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the government has proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

Authority

9th Cir. Jury Instr. 1.5, 3.8 (modified); Judicial Council of California Criminal Jury Instructions, CALCRIM 224 (2017 edition)

Defendant's Proposed Instruction No. 2

Elements of the Offense – Count 1 (8 U.S.C. § 1325)

The defendant is charged in the information with being an alien who attempted reentry into the United States in violation of Section 1325(a)(1) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was an alien at the time of the defendant's attempted entry into the United States;

Second, the defendant had the specific intent to enter the United States at a time and place other than as designated by immigration officers;

Third, the defendant had the specific intent to enter the United States free from official restraint;

Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime; and

Fifth, the defendant committed the offense after having been convicted of a prior offense under Section 1325 of Title 8 of the United States Code.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Defendant's Proposed Instruction No. 3

Elements of the Offense – Count 2 (8 U.S.C. § 1326)

The defendant is charged in the information with being an alien who, after removal, attempted reentry into the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was removed from the United States;

Second, the defendant had the specific intent to enter the United States free from official restraint;

Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;

Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Source

Ninth Cir. Model Jury Instr. 9.7 (brackets removed)

Argument

The government has asked the Court to alter the Ninth Circuit’s model jury instruction on specific intent, and to provide a new instruction of its own devising. *See* Gov. Proposed Jur. Instr., Dkt. No. 69, at 4 (adding language regarding “the defendant’s sole intent” to the model instruction and providing an incomplete definition of “the intent to enter free from official restraint”). The Court should decline this invitation and should instruct the jury as the Ninth Circuit has provided. The Ninth Circuit instruction requires that the jury find “the defendant had the specific intent to enter the United States free from official restraint.” Ninth Cir. Model Jur. Instr. 9.7. These instructions were last approved by the Ninth Circuit in April of 2019, well after *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016), which the government cites in support of its argument.

The model instruction is clear, sufficient, and will not mislead the jury. The question before the jury is simple: has the government proven that Mr. Cabrera possessed the requisite intent when he entered the United States? If the answer is yes, the jury will convict; if no, they will acquit. The presence or absence of specific intent is a binary proposition: Mr. Cabrera either had it or he didn’t. Tinkering with the Ninth Circuit’s language in order to give the prosecution’s theory of the case—that Mr. Cabrera had more than one intent when he entered the United States—the imprimatur of the Court’s endorsement puts the thumb on the scale for the government. The government is free to argue in closing any evidence it can muster

1 that Mr. Cabrera did have the specific intent to enter free from official restraint, and
2 that it doesn't have to negate other possible mental states he may have had. But the
3 instruction itself is quite clear, and the Court should resist the government's attempts
4 to alter it.

Defendant's Proposed Instruction No. 3

“Intent to Enter Free From Official Restraint”

A person has the intent to enter the United States free from official restraint only if he has the intent to enter the United States without being detected, apprehended, or prevented from going at large within the United States and mixing with the population.

A person is not free from official restraint when he is in an area that is subject to constant government surveillance.

Authority

United States v. Castillo-Mendez, 868 F.3d 830, 839 (9th Cir. 2017);

United States v. Vasquez-Hernandez, 849 F.3d 1219, 1227 (9th Cir. 2017)

Defendant's Proposed Jury Instruction No. 5

Theory of Defense

Mr. Cabrera's theory of defense is that he did not have the specific intent to enter the United States free from official restraint, and that he instead intended to be arrested by Border Patrol and taken into custody so that he could apply to seek protection in the United States from returning to El Salvador.

Unless you find that the government has proven beyond a reasonable doubt that Mr. Cabrera had the specific intent to enter the United States free from official restraint – that is, that he intended to enter the United States without being detected, apprehended, or prevented from going at large within the United States and mixing with the population – you must find him not guilty.

V.

Conclusion

For these reasons, Mr. Cabrera asks the Court to give these proposed instructions.

Dated: June 7, 2021

Respectfully submitted,

/s/ Benjamin P. Davis

Benjamin P. Davis

Salil Dudani

Federal Defenders of San Diego, Inc.

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN CARLOS CABRERA,

Defendant.

Case No.: 20-CR-00435-LAB

**UNITED STATES' PROPOSED
JURY INSTRUCTIONS**

Trial Date: June 8, 2021
Time: 9:00 a.m.
Courtroom: 14A, Carter/Keep

Hon. Larry Alan Burns

The United States, through its counsel, hereby submits its proposed jury instructions. Pursuant to this Court's standing order in criminal cases, these proposed instructions comprise instructions listing the elements of the charged offenses, and the United States' proposed non-standard instructions.

DATED: June 1, 2020

Respectfully Submitted,

RANDY S. GROSSMAN
Acting United States Attorney

s/Colin M. McDonald
Colin M. McDonald
Assistant United States Attorney

ER-449

20CR00435-LAB

1 PROPOSED INSTRUCTION FOR COUNT 1

2 The defendant is charged in Count 1 of the indictment with being an alien
3 who attempted entry into the United States at a time or place other than as
4 designated by immigration officers, in violation of Section 1325(a)(1) of Title 8 of
5 the United States Code. In order for the defendant to be found guilty of that charge,
6 the government must prove each of the following elements beyond a reasonable
7 doubt.

8 First, the defendant was an alien at the time of his attempted entry into the
9 United States;

10 Second, the defendant had the specific intent to enter the United States at a
11 time or place other than as designated by immigration officers;

12 Third, the defendant had the specific intent to enter the United States free
13 from official restraint, meaning Defendant intended to enter the United States
14 without being apprehended or prevented from going at large within the United
15 States.

16 Fourth, the defendant did something that was a substantial step toward
17 committing the crime and that strongly corroborated the defendant's intent to
18 commit the crime; and

19 Fifth, the defendant committed the offense after being convicted of a prior
20 illegal-entry offense under Section 1325 of Title 8 of the United States Code.

21
22 An alien is a person who is not a natural-born or naturalized citizen of the
23 United States.

24 A "place other than as designated by immigration officers" refers to any
25 place other than immigration facilities at designated ports of entry.

26 The government does not need to prove that entry free from official restraint
27 was the defendant's sole intent. Rather, the United States must prove only that the
28

1 defendant had a specific intent to enter the United States free from official restraint,
2 not that this was his only purpose.

3 Mere preparation is not a substantial step toward committing the crime. To
4 constitute a substantial step, a defendant's act or actions must unequivocally
5 demonstrate that the crime will take place unless interrupted by independent
6 circumstances.

- 7
- 8 • 9th Cir. Model Instruction 9.7 (Alien—Deported Alien Reentering United
9 States Without Consent) (modifying attempted reentry instruction for attempted
10 entry crime, by removing deportation and consent to reapply elements and
11 adding time or place element).
 - 12 • *United States v. Aldana*, 878 F.3d 877, 882 (9th Cir. 2017) (“Reading §
13 1325(a)(1) and § 235.1 together, we interpret the phrase a ‘place other than as
14 designated by immigration officers’ in § 1325(a)(1) as referring to any place
15 other than immigration facilities at designated ports of entry, as contemplated
16 by § 235.1(a).”).
 - 17 • *United States v. Castillo-Mendez*, 868 F.3d 830, 836 (9th Cir. 2017) (“Should
18 the jury again ask for the definition of official restraint,” in a 1326 attempt
19 prosecution, “the district court should remind the jury that official restraint is
20 relevant only as a part of the defendant's requisite mens rea, and answer with a
21 definition drawn from attempted illegal reentry cases, such as ‘you must find
22 that the defendant had the specific intent to enter free from official restraint,
23 which means intent to enter without being detected, apprehended, or prevented
24 from going at large within the United States and mixing with the population.’”).
 - 25 • *United States v. Argueta-Rosales*, 819 F.3d 1149, 1157 (9th Cir. 2016) (“That
26 being said, we also clarify that the government need not prove that entry free
27 from official restraint was the defendant's *sole* intent. The government must
28 prove only that Argueta had *a* specific intent to enter the United States free from
official restraint, not that this was his only purpose.”) (emphases in original).

PROPOSED INSTRUCTION FOR COUNT 2

The defendant is charged in Count 2 of the indictment with being an alien who, after removal or deportation, attempted reentry into the United States, in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was removed or deported from the United States;

Second, the defendant had the specific intent to enter the United States free from official restraint, meaning Defendant intended to enter the United States without being apprehended or prevented from going at large within the United States;

Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;

Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

The government does not need to prove that entry free from official restraint was the defendant's sole intent. Rather, the United States must prove only that the defendant had a specific intent to enter the United States free from official restraint, not that this was his only purpose.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must unequivocally

1 demonstrate that the crime will take place unless interrupted by independent
2 circumstances.

3 Jurors do not need to agree unanimously as to which particular act or actions
4 constituted a substantial step toward the commission of a crime.

- 5
- 6 • 9th Cir. Model Instruction 9.7 (Alien—Deported Alien Reentering United
7 States Without Consent)
 - 8 • *United States v. Aldana*, 878 F.3d 877, 882 (9th Cir. 2017) (“Reading §
9 1325(a)(1) and § 235.1 together, we interpret the phrase a ‘place other than as
10 designated by immigration officers’ in § 1325(a)(1) as referring to any place
11 other than immigration facilities at designated ports of entry, as contemplated
12 by § 235.1(a).”).
 - 13 • *United States v. Castillo-Mendez*, 868 F.3d 830, 836 (9th Cir. 2017) (“Should
14 the jury again ask for the definition of official restraint,” in a 1326 attempt
15 prosecution, “the district court should remind the jury that official restraint is
16 relevant only as a part of the defendant’s requisite mens rea, and answer with a
17 definition drawn from attempted illegal reentry cases, such as ‘you must find
18 that the defendant had the specific intent to enter free from official restraint,
19 which means intent to enter without being detected, apprehended, or prevented
20 from going at large within the United States and mixing with the population.’”).
 - 21 • *United States v. Argueta-Rosales*, 819 F.3d 1149, 1157 (9th Cir. 2016) (“That
22 being said, we also clarify that the government need not prove that entry free
23 from official restraint was the defendant’s *sole* intent. The government must
24 prove only that Argueta had *a* specific intent to enter the United States free from
25 official restraint, not that this was his only purpose.”) (emphases in original).
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JURY INSTRUCTION NO. ____

You [have heard] [are about to hear] testimony from Leah Hogue, who [testified] [will testify] will testify to opinions and the reasons for her opinions. This opinion testimony is allowed because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

- Ninth Circuit Model Criminal Jury Instructions 4.14 – Opinion Evidence, Expert Witness (2019 ed.).
- Conformed to anticipated fingerprint expert testimony.

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Attorneys for Mr. Cabrera

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE LARRY A. BURNS)

United States of America,	)	<u>Case No:</u> 20-CR-435-LAB
)	
Plaintiff,	)	Hon. Larry A. Burns
vs.	)	Date: June 7, 2021
	)	Time: 2:00 p.m.
Juan Carlos Cabrera,)	
	)	Notice of Motion and Memorandum
Defendant.	)	of Points and Authorities in Support
	)	of Mr. Cabrera's Motion to:
)	
	)	(1) Suppress Statements
)	

NOTICE OF MOTION

Juan Carlos Cabrera, by and through counsel, respectfully asks this Court to grant the below motion to suppress statements.

//

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I. Statement of Facts

According to Border Patrol Agent Cisneros's Memorandum of Investigation, *see* Exhibit A, Mr. Cabrera was arrested on the morning of November 4, 2019, about 50 yards north of the U.S./Mexico border. After being notified by a video surveillance operator of Mr. Cabrera's presence at the "secondary fence" inside the United States, Agent Cisneros went to the area in his Border Patrol vehicle.

Agent Cisneros's arrival was captured on video surveillance *See* Exhibit B (video) at 8:40-9:10. Mr. Cabrera is seated right next to the secondary fence, on a road. Agent Cisneros drives up the road and parks the car feet from Mr. Cabrera and parallel to the secondary fence, in effect trapping Mr. Cabrera between the secondary fence and the Border Patrol vehicle. Agent Cisneros exits the vehicle and leaves the driver's side door open, which door appears very close to Mr. Cabrera, who is still seated. Agent Cisneros stands right next to him and looks down towards him while Mr. Cabrera remains seated. *See id.* at 9:11-11:26. In this position, Mr. Cabrera is boxed in by the fence, Agent Cisneros, and the agent's car. A second vehicle, presumably also Border Patrol's, arrives on the other side of the secondary fence and stops next to Mr. Cabrera and Agent Cisneros for about a minute before driving off. *Id.* at 9:20-10:00. After about two minutes, Mr. Cabrera gets up, and Agent Cisneros puts him in the vehicle; he appears to handcuff Mr. Cabrera before doing so. *Id.* at 11:26.

According to the Memorandum of Investigation, Ex. A, Agent Cisneros had the following exchange with Mr. Cabrera after he arrived on scene: Agent Cisneros identified himself as a Border Patrol agent in Spanish, then conducted an immigration inspection in Spanish. Mr. Cabrera stated he is a citizen of El Salvador. Agent Cisneros asked if he had immigration documents allowing entry to the U.S., and he said no. Agent Cisneros then asked how he entered the U.S., and he said he climbed over the border fence a few minutes prior. Finally, Mr. Cabrera allegedly stated that "his sole purpose

1 for illegally entering the United States in this manner was because he left El Salvador to
2 find work for him.”

3 The entire encounter took place in the 50-yard space between the border fence
4 and the secondary fence, where the public is generally not authorized to enter. *See*
5 Exhibit C (Google Earth image, with arrest coordiantes); Exhibit D (still image of the
6 arrest area provided in discovery, showing the secondary fence constructed after the
7 Google Earth image was taken).

8 II. Argument

9 Mr. Cabrera’s alleged field statements should be suppressed for two reasons.
10 First, Agent Cisneros subjected him to custodial interrogation without the advisals
11 required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Second, Mr. Cabrera’s statements
12 were involuntary. Both grounds independently justify suppression.

13 A. The field statements must be suppressed under *Miranda v. Arizona*.

14 The Court should suppress any statements that the arresting agent purportedly
15 obtained from Mr. Cabrera in conjunction with his arrest. When individuals are
16 subjected to custodial interrogation, they are entitled to procedural safeguards to ensure
17 that they are not compelled to be witnesses against themselves. *See Allen v. Roe*, 305 F.3d
18 1046, 1050 (9th Cir. 2002); U.S. CONST. AMEND. V. Specifically, people are entitled to
19 Miranda warnings “whenever a person in custody is subjected to either express
20 questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

21 Whether Mr. Cabrera was in custody depends on “whether there [was] a
22 ‘formal arrest or restraint on freedom of movement’ of the degree associated with a
23 formal arrest.” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *California v.*
24 *Beheler*, 463 U.S. 1121 1125 (1983)). A person need not be in a police station to be in
25 custody for purposes of *Miranda*. *See Orozco v. Texas*, 394 U.S. 324, 326–27 (1969). The
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28

1 Ninth Circuit utilizes an objective reasonable person test to determine whether a
2 person is in custody:

3 In this circuit an objective reasonable man test is employed in determining
4 whether a person is in custody. The factors to be considered are the language
5 used to summon him, the physical surroundings of the interrogation, the extent
6 to which he is confronted with evidence of his guilt, and pressure exerted to
7 detain him. If the person reasonably believes that he cannot leave freely, he is
8 considered in custody and a *Miranda* warning is required.

9 *United States v. Luther*, 521 F.2d 408, 410 (9th Cir. 1975). Thus, if a reasonable person in
10 the defendant's position would have felt he was not free to leave, the defendant was in
11 custody.

12 Here, no reasonable person in Mr. Cabrera's position would have felt free to
13 leave. The "physical surroundings of the interrogation" are telling. *Id.* Mr. Cabrera was
14 hemmed in between the secondary fence and Agent Cisneros's vehicle. *See* Ex. B-C.
15 Right next to Mr. Cabrera on one side was the secondary fence; on the other, the Border
16 Patrol vehicle. And Agent Cisneros himself blocked off another side, standing over Mr.
17 Cabrera, right next to him, while Mr. Cabrera was seated. Although the discovery does
18 not specify, Agent Cisneros was presumably armed during this encounter. Moreover,
19 the encounter occurred in between the two fences—a zone policed by Border Patrol
20 that is not generally open to the public. It would have been unreasonable for Mr.
21 Cabrera to feel free to leave. For all these reasons, he was in custody when questioned.

22 That Mr. Cabrera was subjected to questioning is clear. Agent Cisneros's report
23 states that he conducted an "immigration inspection" that involved asking Mr.
24 Cabrera questions about his citizenship and entry—in other words, "express
25 questioning." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Routine booking
26 questions do not necessarily require that *Miranda* warnings be given. *See generally*
27 *Pennsylvania v. Muniz*, 496 U.S. 582 (1980). Such questions may include information
28 such as identity, nicknames, age, and address. *United States v. Washington*, 462 F.3d

1 1124, 1132 (9th Cir. 2006). But such questions *do* require *Miranda* warnings if they
2 would cause an accused to make inculpatory statements. *See United States v. Foster*, 227
3 F.3d 1096, 1103 (9th Cir. 2000); *see also Pennsylvania v. Muniz*, 496 U.S. 582, 602 n.14
4 (1990) (“police may not ask questions, even during booking, that are designed to elicit
5 incriminatory admissions”) (internal citation omitted).

6 As a threshold matter, Agent Cisneros’s questioning as to *why* Mr. Cabrera
7 entered the U.S. is not, substantively, a booking question. But the exception does not
8 apply to the other questions, either. Agent Cisneros’s questions about Mr. Cabrera’s
9 citizenship and immigration status were precisely designed to elicit incriminating
10 responses for the offense charged—attempted illegal entry by an alien. Questions rise
11 to the level of interrogation requiring *Miranda* warnings if the questioning officer
12 “should know [the questions] are reasonably likely to elicit an incriminating response.”
13 *Innis*, 447 U.S. at 391. This is assessed by looking at “all the circumstances involved in
14 a given case,” *United States v. Booth*, 669 F. 2d 1231, 1237 (9th Cir. 1981)—that is, the
15 “particular situation,” *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir.
16 1983), including “both the questions and the context.” *United States v. Zapien*, 861 F.3d
17 971, 975 (9th Cir. 2017) (citation omitted). Here, the exchange took place in between
18 the two border fences, and the questions about Mr. Cabrera’s citizenship, immigration
19 status, and entry directly related to the elements of the crime charged. Given these
20 “questions and the context,” *id.*, it would have been obvious to Agent Cisneros that
21 the questions were reasonably likely to elicit an incriminating response. The fact that
22 “[t]he questioning here did not arise in a routine ‘booking’ setting” further supports
23 this conclusion. *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986) (citation
24 omitted).

25 The arresting agent did not provide any *Miranda* warning prior to asking these
26 questions at the time of arrest. Because the field statements were thus the result of un-
27 warned custodial interrogation, they must be suppressed.

Exhibit A

ER-460

U.S. Department of Homeland Security

MEMORANDUM OF INVESTIGATION

File Number
A076 490 689

Title:
CABRERA, JUAN CARLOS

Control Office
SDC/IMB

Memorandum of Investigation

On November 4, 2019, at approximately 6:48a.m., I, Border Patrol Agent Joseph Cisneros, was conducting linewatch operations in the Imperial Beach Border Patrol area of operations in an area known to Border Patrol Agents as "Whiskey 15." This area is approximately 50 yards north of the U.S./Mexico International Boundary fence and five miles west of the San Ysidro, California Port of Entry. At approximately 6:50 a.m., I was notified by the Remote Video Surveillance system operator, via service radio, of a subject that was in between the United States/Mexico International Boundary fence and the secondary fence. It was stated by the system operator they he had begun to go north towards the secondary fence. The operator described him as being a single male subject. This area is also used regularly by aliens trying to further their illegal entry into the United States. I responded to the area in my assigned government vehicle, and I drove to his location. I identified myself as a United States Border Patrol Agent in the Spanish language. I proceeded to conduct an immigration inspection on the adult male, later identified as CABRERA, Juan, in the Spanish language. CABRERA stated that he is a citizen of El Salvador. I then asked him if he had any immigration documents in his possession which would allow him to enter or remain in the United States legally. CABRERA replied, "No." I then asked how he entered the United States. CABRERA stated to me that he illegally entered the United States by climbing over the U.S./Mexico International Boundary fence a few minutes earlier today. CABRERA stated to me that his sole purpose for illegally entering the United States in this manner was because he left El Salvador to find work for him. I searched CABRERA for any immigration documents in his possession which would allow him to enter or remain in the United States legally and found none.

I arrested CABRERA-Juan at approximately 7:00 a.m. and arranged to have him transported to the Imperial Beach Border Patrol Station for processing.

Investigator
Border Patrol Agent

JOSEPH CISNEROS

Date
November 04, 2019


Exhibit C

ER-462



Arrest Site

Legend

 32.53509, -117.12023

32.53509, -117.12023

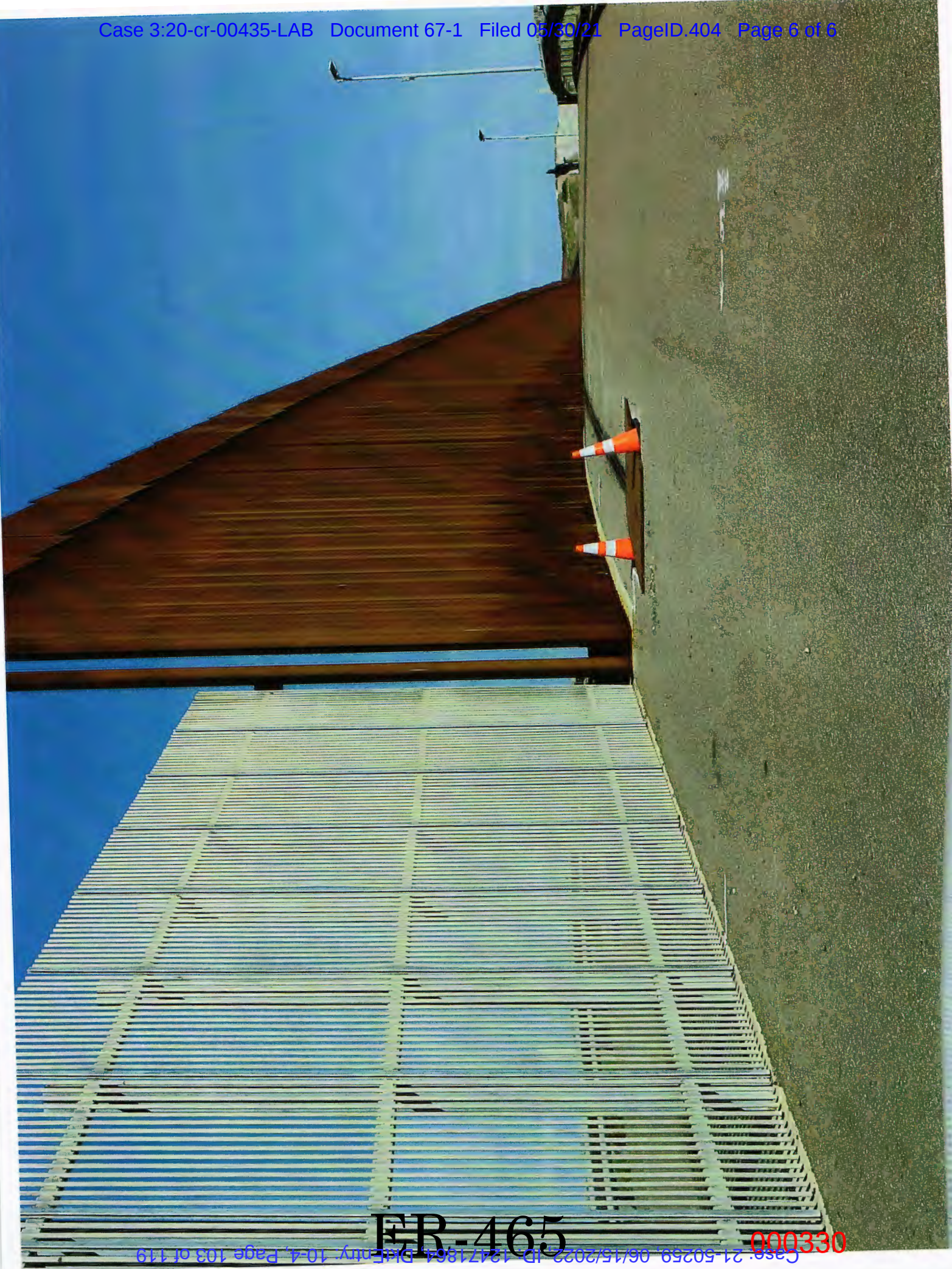
ER-463


N

 60 ft

Exhibit D

ER-464



ER-465

000330

AO 245B (CASDRev. 08/13) Judgment in a Criminal Case for Revocations

FILED

JAN 29 2018

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Revocation of Probation or Supervised Release)

(For Offenses Committed On or After November 1, 1987)

V.

JUAN CARLOS CABRERA

Case Number: 15CR0353-L

BENJAMIN DAVIS, FEDERAL DEFENDERS OF SAN DIEGO, INC
Defendant's Attorney

REGISTRATION NO. 26618038

☐

THE DEFENDANT:

☒ admitted guilt to violation of allegation(s) No. ONE (1)☐ was found guilty in violation of allegation(s) No. _____ after denial of guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following allegation(s):

Allegation Number

1

Nature of Violation

nv35, Illegal entry into United States

Supervised Release is revoked and the defendant is sentenced as provided in page 2 through 4 of this judgment.
The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

January 29, 2018

Date of Imposition of Sentence


HON. M. James Lorenz

UNITED STATES DISTRICT JUDGE

15CR0353-L

ER-466

AO 245B (CASD Rev. 08/13) Judgment in a Criminal Case for Revocations

DEFENDANT: JUAN CARLOS CABRERA
CASE NUMBER: 15CR0353-L

Judgment - Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
TIME SERVED

- ☐ Sentence imposed pursuant to Title 8 USC Section 1326(b).
☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ A.M. on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ on or before
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

ER-467

15CR0353-L

AO 245B (CASD Rev. 08/13) Judgment in a Criminal Case for Revocations

DEFENDANT: JUAN CARLOS CABRERA
CASE NUMBER: 15CR0353-L

Judgment - Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
TWO (2) YEARS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons unless removed from the United States.

The defendant shall not commit another federal, state or local crime.

For offenses committed on or after September 13, 1994:

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of a DNA sample from the defendant, pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000, pursuant to 18 USC section 3583(a)(7) and 3583(d).
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable.)*

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court. The defendant shall also comply with any special conditions imposed.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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15CR0353-L

AO 245B (CASD Rev. 08/13) Judgment in a Criminal Case for Revocations

DEFENDANT: JUAN CARLOS CABRERA
CASE NUMBER: 15CR0353-L

Judgment - Page 4 of 4

SPECIAL CONDITIONS OF SUPERVISION

- 1) If deported, excluded or allowed to voluntarily return to country of origin, not reenter the United States illegally and report to the probation officer within 24 hours of any reentry to the United States; supervision waived upon deportation, exclusion, or voluntary departure.

//

Benjamin P. Davis

California Bar No. 275918

Federal Defenders of San Diego, Inc.

225 Broadway, Suite 900

San Diego, California 92101-5008

Telephone: (619) 234-8467

benjamin_davis@fd.org

_____Retained X Appointed

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Trial Judge: Honorable Larry A. Burns

Court Reporter: Cynthia Ott

United States of America,

Case No.: 20CR0435-LAB

(Appellee) Plaintiff,

VS.

Notice of Appeal (Criminal)

Juan Carlos Cabrera,

(Appellant) Defendant.

Notice is hereby given that **Juan Carlos Cabrera**, Appellant-Defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the

(**x**) final judgment (F. R. Crim. P. 32(b))

() sentence only (18 U.S.C. § 3742) Sentence imposed _____.

() order (describe):

the last of which was entered in this proceeding on the 15th day of November 2021.

If government appeal: Was the filing of this appeal approved in accordance with 18 U.S.C. § 3742(b)(4)? ____Yes____ No

Dated: November 16, 2021

s/ Benjamin P. Davis

Signature*

ER-470

Transcripts Required** x Yes No Date Ordered or to be ordered: 11/19/2021

Date (x) Indictment () Information Filed 02/06/2020

Bail Status in custody

Will there be a request to expedite the appeal and set a schedule faster than that normally set?
 Yes x No (Note: This does not alleviate requirement of FRAP 27-12 a motion to expedite which must be done in accordance with FRAP 27).

*Pursuant to Fed. R. Crim. P. 32(a)(2) the defendant may request the clerk to prepare and file the Notice of Appeal.

**If transcript required, transcript order form (CA9-036 must be completed and court reporter contacted to make arrangements for transcription.

APPEAL,RELATED,SEALDC,TRIAL

**U.S. District Court
Southern District of California (San Diego)
CRIMINAL DOCKET FOR CASE #: 3:20-cr-00435-LAB-1**

Case title: USA v. Cabrera

Date Filed: 02/06/2020

Assigned to: Chief Judge Larry
Alan Burns

Appeals court case number:
21-50259 USCA

Defendant (1)

Juan Carlos Cabrera

represented by **Federal Defenders**
Federal Defenders of San Diego
225 Broadway
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TERMINATED: 02/11/2020
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
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ATTORNEY TO BE NOTICED
*Designation: Public Defender or Community
Defender Appointment*

Pending Counts

8:1325(a)(1) – Attempted
Unlawful Entry by an Alien
(Felony)
(1)

8:1326(a),(b) – Attempted
Reentry of Removed Alien

Disposition

Bureau of Prisons for 24 months to run concurrent
to count 2, no supervised release, no fine,
assessment \$100.00 – waived

Bureau of Prisons for 51 months to run concurrent
to count 1, supervised release 3 years, no fine,

ER-472

(2)

assessment \$100.00 – waived

**Highest Offense Level
(Opening)**

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Plaintiff

USA

represented by **U S Attorney CR**
U S Attorneys Office Southern District of
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Criminal Division
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San Diego, CA 92101
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Fax: (619)557-5917
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ATTORNEY TO BE NOTICED
Designation: Assistant United States
Attorney

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Date Filed	#	Docket Text
02/06/2020	<u>1</u>	INDICTMENT as to Juan Carlos Cabrera (1) count(s) 1, 2. (smd) (sjt). (Entered: 02/06/2020)
02/06/2020	<u>2</u>	NOTICE OF RELATED CASE(S) by USA of case(s) 19cr4872-L. (smd) (Entered: 02/06/2020)
02/06/2020	3	MINUTE ORDER OF JUDGE TRANSFER in case as to Juan Carlos Cabrera. Judge M. James Lorenz is no longer assigned. Case reassigned to Chief Judge Larry Alan Burns for all further proceedings. The new case number is 20CR435-LAB. (no document attached) (sjt) (Entered: 02/06/2020)
02/06/2020	4	Set/Reset Duty Hearings as to Juan Carlos Cabrera: Arraignment set for 2/7/2020 before Magistrate Judge William V. Gallo. (no document attached) (als) (Entered: 02/06/2020)
02/06/2020	5	NOTICE OF HEARING as to Defendant Juan Carlos Cabrera. Arraignment set for 2/7/2020 at 2:00 PM before Magistrate Judge William V. Gallo. (no document attached) (als) (Entered: 02/06/2020)
02/07/2020	6	Minute Entry for proceedings held before Magistrate Judge William V. Gallo: Arraignment on Indictment and Initial Appearance as to Juan Carlos Cabrera (1) Count 1,2 held on 2/7/2020. Not Guilty plea entered. Appointed Attorney Federal Defenders for Juan Carlos Cabrera. Bond set as to Juan Carlos Cabrera (1) \$20,000 P/S sec by 2 FRA's with same terms and conditions as related case 19CR4872-LAB. (Motion Hearing/Trial Setting set for 2/24/2020 02:00 PM before Chief Judge Larry Alan Burns) (Interpreter Nelly Sztuden). (CD# 2/7/2020 WVG 20-1:3:41-3:43). (Plaintiff Attorney Ronald Sou AUSA). (Defendant Attorney Keshav Nair FD-S/A). (aje) (Entered: 02/10/2020)
02/07/2020	7	***Spanish Interpreter needed as to Juan Carlos Cabrera (no document attached) (aje) (Entered: 02/10/2020)
02/07/2020	<u>8</u>	ORDER Setting Conditions of Release. Bond set for Juan Carlos Cabrera (1) \$20,000 P/S. Signed by Magistrate Judge Allison H. Goddard on 11/08/2019. (mme) (Entered: 02/10/2020)
02/11/2020	<u>9</u>	NOTICE OF ATTORNEY APPEARANCE: Benjamin P. Davis appearing for Juan Carlos Cabrera (Davis, Benjamin)Attorney Benjamin P. Davis added to party Juan Carlos Cabrera(pty:dft) (jdt). (Entered: 02/11/2020)
02/12/2020	<u>10</u>	NOTICE OF ATTORNEY APPEARANCE Colin M. McDonald appearing for USA. (McDonald, Colin)Attorney Colin M. McDonald added to party USA(pty:pla) (jdt). (Entered: 02/12/2020)
02/19/2020	<u>11</u>	MOTION to Shorten Time To File Motions for Fingerprint Exemplars and Reciprocal Discovery by USA as to Juan Carlos Cabrera. (McDonald, Colin) (jdt). (Entered: 02/19/2020)
02/19/2020	<u>12</u>	MOTION for Fingerprint Exemplars , MOTION for Reciprocal Discovery by USA as to Juan Carlos Cabrera. (McDonald, Colin) (jdt). (Entered: 02/19/2020)

ER-474

02/19/2020	<u>13</u>	MINUTE ORDER by Chief Judge Larry Alan Burns on 2/19/2020; Granting <u>11</u> Motion to Shorten Time as to Juan Carlos Cabrera (1). (no document attached) (srm) (Entered: 02/19/2020)
02/24/2020	<u>14</u>	Minute Entry for proceedings held before Chief Judge Larry Alan Burns: Motion Hearing/Trial Setting as to Juan Carlos Cabrera held on 2/24/2020. Granting <u>12</u> Motion for Fingerprint Exemplars as to Juan Carlos Cabrera (1); Granting <u>12</u> Motion for Reciprocal Discovery as to Juan Carlos Cabrera (1); Jury Trial set for 4/7/2020 09:00 AM before Chief Judge Larry Alan Burns. Motion In Limine Hearing set for 4/6/2020 02:00 PM before Chief Judge Larry Alan Burns. (Interpreter Dan DeCoursey). (Court Reporter/ECR James Pence). (Plaintiff Attorney Colin McDonald). (Defendant Attorney Benjamin Davis, FD). (no document attached) (tlw) (Entered: 02/24/2020)
03/11/2020	<u>15</u>	NOTICE OF ATTORNEY APPEARANCE Adam Gordon appearing for USA. (Gordon, Adam)Attorney Adam Gordon added to party USA(pty:pla) (jdt). (Entered: 03/11/2020)
03/13/2020	<u>18</u>	ORDER as to Juan Carlos Cabrera. Signed by Chief Judge Larry Alan Burns on 3/12/2020. (anh) (Entered: 03/18/2020)
03/16/2020	<u>16</u>	MOTION to Dismiss <i>Count 2 of the Indictment</i> by Juan Carlos Cabrera. (Attachments: # <u>1</u> Memo of Points and Authorities, # <u>2</u> Exhibit A–G)(Davis, Benjamin) (jdt). (Entered: 03/16/2020)
03/23/2020	<u>19</u>	MINUTE ORDER by Chief Judge Larry Alan Burns on 3/23/2020 as to Juan Carlos Cabrera: Motion In Limine Hearing set for 4/6/2020 is vacated and continued to 4/16/2020 10:00 AM before Chief Judge Larry Alan Burns. Jury trial setting set for 4/16/2020 at 10:00 AM. Pursuant to Order of the Chief Judge No. 18 filed on March 17, 2020, time is excluded under the Speedy trial Act under 18 U.S.C. § 3161(h)(7)(A) on the grounds that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial (no document attached) (tlw) (Entered: 03/23/2020)
04/02/2020	<u>20</u>	MOTION to Unseal Document : <i>Government's Ex Parte Application</i> by Juan Carlos Cabrera. (Attachments: # <u>1</u> Memo of Points and Authorities)(Davis, Benjamin) (anh). (Entered: 04/02/2020)
04/02/2020	<u>21</u>	MOTION to Suppress Statements , In Limine MOTION to Preclude Evidence <i>Under Rule 404(b)</i> , In Limine MOTION to Exclude Evidence Under Rule 609 , In Limine MOTION to Preclude Testimony <i>of an Expert</i> , In Limine MOTION to Exclude Statement <i>Unless Proven Voluntary</i> , In Limine MOTION to Admit <i>Prior Statements</i> , In Limine MOTION to Preclude <i>A–File Documents and Testimony</i> , In Limine MOTION to Exclude Evidence <i>Not Yet Produced in Discovery</i> , In Limine MOTION to Exclude <i>Statements Not Yet Produced in Discovery</i> , In Limine MOTION for Order <i>Regarding Form & Conduct of Trial</i> by Juan Carlos Cabrera. (Attachments: # <u>1</u> Memo of Points and Authorities)(Davis, Benjamin) (jdt). (Entered: 04/02/2020)
04/08/2020	<u>22</u>	MINUTE ORDER by Chief Judge Larry Alan Burns as to Juan Carlos Cabrera: Court vacates motion in limine hearing set for 4/16/2020. Time is excluded under the Speedy trial Act under 18 U.S.C. § 3161(h)(7)(A) and 18 U.S.C 3174, on the grounds that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. Status Hearing set for 5/18/2020 02:00 PM before Chief Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 04/08/2020)
05/01/2020	<u>23</u>	RESPONSE in Opposition by USA as to Juan Carlos Cabrera re <u>16</u> MOTION to Dismiss <i>Count 2 of the Indictment</i> (McDonald, Colin) (jdt). (Entered: 05/01/2020)
05/08/2020	<u>24</u>	Minute Order by Chief Judge Larry Alan Burns on 5/8/2020 as to Juan Carlos Cabrera: Court vacates the Status Hearing set for May 18, 2020 at 2 p.m. and resets the Status Hearing to June 10, 2020 at 10 a.m. Pursuant to Order of Judicial Emergency in the Southern District of California adopted April 2, 2020 suspending Speedy Trial Act limits in the district for one year, time is excluded under the Speedy Trial Act under 18 U.S.C. § 3161(h)(7)(A) on the grounds that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. Any party seeking relief shall file a motion stating cause. (no document attached) (jao) (Entered: 05/08/2020)

05/11/2020	<u>25</u>	Order Authorizing Video Teleconference as to Juan Carlos Cabrera re <u>24</u> . Signed by Chief Judge Larry Alan Burns on 5/11/2020. (jao) (Entered: 05/11/2020)
05/11/2020	<u>26</u>	ORDER AND FINDINGS OF FACT (COVID-19) as to Juan Carlos Cabrera. Signed by Chief Judge Larry Alan Burns on 5/11/2020. (jao) (Entered: 05/11/2020)
06/02/2020	<u>27</u>	NOTICE OF ATTORNEY APPEARANCE: Salil Dudani appearing for Juan Carlos Cabrera <i>Co-Counsel</i> (Dudani, Salil)Attorney Salil Dudani added to party Juan Carlos Cabrera(pty:dft) (jdt). (Entered: 06/02/2020)
06/03/2020	<u>28</u>	MOTION for Leave to File <i>Reply to Government's Response in Opposition to Mr. Cabrera's Motion to Dismiss Count 2 Under § 1326(d)</i> by Juan Carlos Cabrera. (Attachments: # <u>1</u> Exhibit Proposed Reply and Exhibit H)(Davis, Benjamin) (jdt). (Entered: 06/03/2020)
06/04/2020	<u>29</u>	ORDER. The Defendant's Motion for Leave to File a Reply, Dkt. No. <u>28</u> , is granted. Defense counsel is directed to e-file the document currently filed as Dkt. No. 28-1 as a new filing under the CM/ECF Criminal event "Reply to Response" to motion. Signed by Chief Judge Larry Alan Burns on 6/4/2020. (jdt) (Entered: 06/04/2020)
06/04/2020	<u>30</u>	REPLY TO RESPONSE to Motion by Juan Carlos Cabrera re <u>16</u> MOTION to Dismiss <i>Count 2 of the Indictment</i> (Attachments: # <u>1</u> Exhibit H)(Davis, Benjamin) (jdt). (Entered: 06/04/2020)
06/09/2020	<u>31</u>	ORDER AUTHORIZING VIDEO TELECONFERENCE as to Juan Carlos Cabrera. Signed by Chief Judge Larry Alan Burns on 6/9/2020. (jdt) (Entered: 06/09/2020)
06/10/2020	<u>32</u>	RESPONSE in Opposition by USA as to Juan Carlos Cabrera re <u>20</u> MOTION to Unseal Document : <i>Government's Ex Parte Application</i> (McDonald, Colin) (jdt). (Entered: 06/10/2020)
06/10/2020	33	Minute Entry for proceedings held before Chief Judge Larry Alan Burns:Status Hearing re jury trial as to Juan Carlos Cabrera held on 6/10/2020. Motion In Limine Hearing as to Juan Carlos Cabrera held on 6/10/2020. Denying <u>16</u> Motion to Dismiss as to Juan Carlos Cabrera (1); denying <u>20</u> MOTION to Unseal Document : <i>Government's Ex Parte Application</i> ; Finding as moot MOTION to Suppress Statements; defer ruling on In Limine MOTION to Preclude Evidence <i>Under Rule 404(b)</i> ; defer ruling on In Limine MOTION to Exclude Evidence Under Rule 609 ; defer ruling on (need guidelines) In Limine MOTION to Preclude Testimony <i>of an Expert</i> ; defer ruling on In Limine MOTION to Exclude Statement <i>Unless Proven Voluntary</i> (govt to produce video and witness statement); defer ruling on In Limine MOTION to Admit <i>Prior Statements</i> ; granting in part In Limine MOTION to Preclude <i>A-File Documents and Testimony (warrant of removal approved)</i> (<i>Court reserves on warning document</i>); granted In Limine MOTION to Exclude Evidence <i>Not Yet Produced in Discovery</i> ; granted In Limine MOTION to Exclude <i>Statements Not Yet Produced in Discovery</i> ; Government's oral motion for leave to file in limine motions – granted. Jury Trial set for 7/21/2020 09:00 AM before Chief Judge Larry Alan Burns. Motion In Limine Hearing set for 7/20/2020 02:00 PM before Chief Judge Larry Alan Burns. (Interpreter Juan Davila-Santiago). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Colin McDonald). (Defendant Attorney Benjamin Davis, FD). (no document attached) (tlw) (Entered: 06/11/2020)
07/01/2020	<u>34</u>	NOTICE of <i>Fingerprint Expert Testimony</i> by USA (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit)(Gordon, Adam) (jdt). (Entered: 07/01/2020)
07/13/2020	<u>37</u>	In Limine MOTION to Admit <i>Certified Documents</i> , In Limine MOTION to Admit <i>Videotaped Sworn Statement</i> , In Limine MOTION to Admit <i>A-File Documents</i> , In Limine MOTION to Admit Expert Testimony , In Limine MOTION to Admit <i>Testimony Regarding Public Records Searches</i> , In Limine MOTION to Admit Evidence Under Rule 609 , In Limine MOTION to Preclude Evidence of <i>Duress and Necessity</i> , In Limine MOTION to Preclude <i>Evidence Not Previously Produced or Noticed</i> by USA as to Juan Carlos Cabrera. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3)(McDonald, Colin) (jdt). (Entered: 07/13/2020)
07/15/2020	38	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: On the Court's own motion, jury trial set for 7/21/20 and motion in limine hearing set for 7/20/20 is vacated. Status Hearing re: jury trial set for 7/22/2020 09:00 AM before

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		Chief Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 07/15/2020)
07/15/2020	<u>39</u>	Order Authorizing Video Teleconference as to Juan Carlos Cabrera re 38 . Signed by Chief Judge Larry Alan Burns on 7/15/2020. (jao) (Entered: 07/15/2020)
07/17/2020	40	NOTICE OF TIME CHANGE ONLY as to Defendant Juan Carlos Cabrera: Status Hearing re: jury trial/motions in limine set for 7/22/2020 will be held at 10:00 AM before Chief Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 07/17/2020)
07/22/2020	44	Minute Entry for proceedings held before Chief Judge Larry Alan Burns: Status Hearing re new dates as to Juan Carlos Cabrera held on 7/22/2020. Motion In Limine Hearing set for 9/21/2020 02:00 PM before Chief Judge Larry Alan Burns. Jury Trial set for 9/22/2020 09:00 AM before Chief Judge Larry Alan Burns. (Interpreter Deborah Berry). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Adam Gordon). (Defendant Attorney Benjamin Davis). (no document attached) (tlw) (Entered: 07/22/2020)
09/15/2020	45	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: On the Court's own motion, the Motion In Limine Hearing set for 9/21/20 is vacated and reset for 9/23/2020 09:00 AM before Chief Judge Larry Alan Burns. Trial setting set for 9/23/20 9:00 AM and jury trial set for 9/22/20 is vacated.(no document attached) (tlw) (Entered: 09/15/2020)
09/22/2020	<u>49</u>	ORDER Authorizing Video Teleconference as to Juan Carlos Cabrera re 45 . Signed by Chief Judge Larry Alan Burns on 9/22/2020. (jao) (Entered: 09/22/2020)
09/23/2020	50	Minute Entry for proceedings held before Chief Judge Larry Alan Burns: Motion In Limine Hearing as to Juan Carlos Cabrera held on 9/23/2020 re 43 SEALED MOTION filed by USA – granted. Trial setting status Hearing set for 10/28/2020 09:00 AM before Chief Judge Larry Alan Burns. (1–2 days) (Interpreter Daniel Novoa). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Colin McDonald). (Defendant Attorney Benjamin Davis,FD). (no document attached) (tlw) (Entered: 09/23/2020)
10/27/2020	<u>51</u>	ORDER AUTHORIZING VIDEO TELECONFERENCE as to Juan Carlos Cabrera. Signed by Chief Judge Larry Alan Burns on 10/27/2020. (jdt) (Entered: 10/27/2020)
10/28/2020	52	Minute Entry for proceedings held before Chief Judge Larry Alan Burns: Status Hearing re trial setting as to Juan Carlos Cabrera held on 10/28/2020. Motion In Limine Hearing set for 12/15/2020 02:00 PM before Chief Judge Larry Alan Burns. Jury Trial set for 12/16/2020 09:00 AM before Chief Judge Larry Alan Burns. (Interpreter MariaPaz Sandoval). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Colin McDonald). (Defendant Attorney Benjamin Davis, FD). (no document attached) (tlw) (Entered: 10/28/2020)
11/30/2020	53	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: On the Court's own motion, the Jury Trial is reset for 12/15/2020 09:00 AM before Chief Judge Larry Alan Burns. Motion In Limine Hearing reset for 12/14/2020 02:00 PM before Chief Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 11/30/2020)
12/06/2020	<u>54</u>	TRIAL BRIEF by USA as to Juan Carlos Cabrera (McDonald, Colin) (jdt). (Entered: 12/06/2020)
12/09/2020	55	MINUTE ORDER by Chief Judge Larry Alan Burns on 12/9/20 as to Juan Carlos Cabrera: Court vacates jury trial set for December 15, 2020. Based upon the current status of the coronavirus pandemic and in conformity with OCJ 52 (Proceedings During the Covid–19 Public Emergency) the motions in limine and trial setting hearing is continued to January 11, 2021, at 2:00 p.m. The Court finds that the time from the date of this Order to the next hearing is tolled under the Speedy Trial Act and pursuant to 18 U.S.C. § 3174., (Motion In Limine Hearing set for 1/11/2021 02:00 PM before Chief Judge Larry Alan Burns., Status Hearing set for 1/11/2021 02:00 PM before Chief Judge Larry Alan Burns.). Signed (no document attached) (tlw) (Entered: 12/09/2020)
01/04/2021	<u>56</u>	RESPONSE in Opposition by Juan Carlos Cabrera re <u>37</u> In Limine MOTION to Admit <i>Certified Documents</i> . In Limine MOTION to Admit <i>Videotaped Sworn Statement</i> , In

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		Limine MOTION to Admit <i>A-File Documents</i> , In Limine MOTION to Admit Expert Testimony , In Limine MOTION to Admit Testimony <i>Regarding Public Records Searches</i> , In Limine MOTION to Admit Evidence Under Rule 609 , In Limine MOTION to Preclude Evidence of <i>Duress and Necessity</i> , In Limine MOTION to Preclude <i>Evidence Not Previously Produced or Noticed</i> (Dudani, Salil) (jdt). (Entered: 01/04/2021)
01/06/2021	57	MINUTE ORDER as to Juan Carlos Cabrera by Chief Judge Larry Alan Burns This case is currently scheduled for Status/Motion in Limine on January 11, 2021. Based upon the current status of the coronavirus pandemic and in conformity with OCJ 52-B (Proceedings During the Covid-19 Public Emergency) the hearing is continued to 2/8/2021 2:00 PM. The Court finds that the time from the date of this Order to the next hearing is tolled under the Speedy Trial Act and pursuant to 18 U.S.C. § 3174 (no document attached) (smr) (Entered: 01/06/2021)
02/01/2021	<u>58</u>	ORDER AND FINDINGS OF FACT (COVID-19) as to Juan Carlos Cabrera. Signed by Judge Larry Alan Burns on 2/1/2021. (jdt) (Entered: 02/02/2021)
02/03/2021	59	MINUTE ORDER by Judge Larry Alan Burns as to Juan Carlos Cabrera: This case is currently scheduled for trial setting on February 8, 2021. Based upon the current status of the coronavirus pandemic and in conformity with OCJ 56 (Proceedings During the Covid-19 Public Emergency) the hearing is continued to March 17, 2021, at 9:00 a.m. The Court finds that the time from the date of this Order to the next hearing is tolled under the Speedy Trial Act and pursuant to 18 U.S.C. § 3174. (no document attached) (tlw) (Entered: 02/03/2021)
03/10/2021	60	MINUTE ORDER by Judge Larry Alan Burns as to Juan Carlos Cabrera: This case is currently scheduled for trial setting on March 17, 2021. Based upon the current status of the coronavirus pandemic and in conformity with OCJ 63 (Proceedings During the Covid-19 Public Emergency) the hearing is continued to April 14, 2021, at 9:00 a.m. The Court finds that the time from the date of this Order to the next hearing is tolled under the Speedy Trial Act and pursuant to 18 U.S.C. § 3174 (no document attached) (tlw) (Entered: 03/10/2021)
04/14/2021	61	Minute Entry for proceedings held before Judge Larry Alan Burns: Defendant consents to proceed via VTC.Trial Status Hearing as to Juan Carlos Cabrera held on 4/14/2021 Motion In Limine Hearing set for 7/26/2021 02:00 PM before Judge Larry Alan Burns. Jury Trial set for 7/27/2021 02:00 PM before Judge Larry Alan Burns. (Interpreter Mylene Green). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Colin McDonald). (Defendant Attorney Benjamin Davis, FD). (no document attached) (tlw) (Entered: 04/15/2021)
04/20/2021	62	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: On the Court's own motion, the Jury Trial set for 7/27/21 is vacated and reset for 5/4/2021 09:00 AM before Judge Larry Alan Burns. Motion In Limine Hearing set for 7/26/21 is vacated and reset for 5/3/2021 02:00 PM before Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 04/20/2021)
04/20/2021	63	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: Per USM, defendant unavailable due to medical reasons (quarantine) for up to 20 days. Trial Status Hearing set for 4/26/2021 02:00 PM before Judge Larry Alan Burns. Court vacates motion in limine hearing and jury trial date 5/4/21. (no document attached) (tlw) (Entered: 04/20/2021)
04/26/2021	64	Minute Entry for proceedings held before Judge Larry Alan Burns: Defendant not available, in hospital. Status Hearing re trial setting as to Juan Carlos Cabrera held on 4/26/2021. Excludable(s) started as to Juan Carlos Cabrera: XM - Unavailability of defendant 4/26/21-5/11/21. Motion In Limine Hearing set for 5/10/2021 02:00 PM before Judge Larry Alan Burns. Jury Trial set for 5/11/2021 09:00 AM before Judge Larry Alan Burns. (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Adam Gordon). (Defendant Attorney Benjamin Davis, FD). (no document attached) (tlw) (Entered: 04/26/2021)
04/28/2021	65	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: Defendant will not be available for trial, in hospital. Counsel to update the court on the defendant's readiness for trial. Jury trial set for 5/11/21 and motions in limine set for 5/10/21 is vacated. Trial Status Hearing set for 6/1/2021 02:00 PM before Judge Larry

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		Alan Burns. (no document attached) (tlw) (Entered: 04/28/2021)
05/25/2021	<u>66</u>	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: Per MCC, the defendant is no longer in the hospital. Court sets the jury trial for 6/8/2021 09:00 AM before Judge Larry Alan Burns. Motion In Limine Hearing set for 6/7/2021 02:00 PM before Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 05/25/2021)
05/30/2021	<u>67</u>	MOTION to Suppress Statements by Juan Carlos Cabrera. (Attachments: # <u>1</u> Exhibit A, C-D)(Dudani, Salil) (ag). (Entered: 05/30/2021)
06/01/2021	<u>68</u>	NOTICE OF ATTORNEY APPEARANCE Amanda T. Muskat appearing for USA. (Muskat, Amanda)Attorney Amanda T. Muskat added to party USA(pty:pla) (jmr). (Entered: 06/01/2021)
06/01/2021	<u>69</u>	Proposed Jury Instructions by USA as to Juan Carlos Cabrera (McDonald, Colin) (jmr). (Entered: 06/01/2021)
06/07/2021	<u>70</u>	Proposed Jury Instructions by Juan Carlos Cabrera (Davis, Benjamin) (jmr). (Entered: 06/07/2021)
06/07/2021	<u>71</u>	EXHIBIT LIST by USA as to Juan Carlos Cabrera (McDonald, Colin) (jmr). (Entered: 06/07/2021)
06/07/2021	<u>72</u>	Minute Entry for proceedings held before Judge Larry Alan Burns: Motion In Limine Hearing as to Juan Carlos Cabrera held on 6/7/2021. Granting <u>37</u> In Limine MOTION to Admit <i>Certified Documents</i> ; Granting In Limine MOTION to Admit <i>Videotaped Sworn Statement</i> ; granting in part In Limine MOTION to Admit A- <i>File Documents</i> ; granting In Limine MOTION to Admit Expert Testimony ; granting In Limine MOTION to Admit Testimony <i>Regarding Public Records Searches</i> ; granting In Limine MOTION to Admit Evidence Under Rule 609 and reserve until trial as to 404B ; finding as moot In Limine MOTION to Preclude Evidence of <i>Duress and Necessity</i> ; finding as moot In Limine MOTION to Preclude <i>Evidence Not Previously Produced or Noticed</i> filed by USA; Denying <u>67</u> MOTION to Suppress Statements filed by Juan Carlos Cabrera. Govt motion to exclude dft expert witness – granted. (Interpreter MariaPaz Sandoval, Paula Navarro-Gomez). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Amanda Muskat and Colin McDonald). (Defendant Attorney Benjamin Davis, FD and Salil Dudani). (no document attached) (tlw) (Entered: 06/08/2021)
06/08/2021	<u>73</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Jury Trial, Day 1, Cross and Redirect of Joseph Cisneros) as to Juan Carlos Cabrera held on 6/8/2021 before Judge Larry Alan Burns. Court Reporter/Transcriber: Cynthia R. Ott. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 6/29/2021. Redacted Transcript Deadline set for 7/9/2021. Release of Transcript Restriction set for 9/7/2021. (akr) (Entered: 06/09/2021)
06/08/2021	<u>74</u>	Minute Entry for proceedings held before Judge Larry Alan Burns: Jury Trial as to Juan Carlos Cabrera held on 6/8/2021. Day of Trial 1. 12 Trial Jurors Present. 0 Alternate Jurors Present. Jury impaneled. Opening statements. Swore witnesses. Exhibits marked/received. Government rest. Defendant's rule 29 motion – denied. Defense rest. Jury instructions conference. Jury trial continued to 6/9/21 at 9:00 AM before Judge Larry Alan Burns. (Interpreter Paula Navarro-Gomez, Ana Reyna). (Court Reporter/ECR Cynthia Ott, Amanda LeGore). (Plaintiff Attorney Amanda Muskat and Colin McDonald). (Defendant Attorney Benjamin Davis, FD and Salil Dudani). (no document attached) (tlw) (Entered: 06/09/2021)
06/09/2021	<u>75</u>	Minute Entry for proceedings held before Judge Larry Alan Burns: Jury Trial as to Juan Carlos Cabrera held on 6/9/2021. Day of Trial 2. 12 Jurors Present. 0 Alternate Jurors Present. Closing arguments. Exhibits marked/received. Jury retired to deliberate at 10:45 AM. Jury returned at 3:35 PM. Verdict: guilty on counts 1 and 2. Jury polled.

		Meals ordered at government expense. PSR Ordered and Sentencing w/PSR set for 9/27/21 at 9 AM before Judge Larry Alan Burns. Government's request to vacate 7/27/21 revocation of supervised release hearing and continue to 9/27/21 at 9 AM in related case 15CR353-LAB –Granted. (Interpreter Ana Reyna, Paula Navarro–Gomez). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Amanda Muskat and Colin McDonald). (Defendant Attorney Benjamin Davis, FD and Salil Dudani). (no document attached) (tlw) (Entered: 06/09/2021)
06/09/2021	<u>76</u>	JURY VERDICT as to Juan Carlos Cabrera (1) Guilty on Count 1,2. (tlw) (Entered: 06/09/2021)
06/09/2021	<u>77</u>	COURT'S Jury Instructions as to Defendant Juan Carlos Cabrera (tlw) (Entered: 06/09/2021)
06/09/2021	<u>78</u>	COURT EXHIBIT LIST (tlw) (Entered: 06/09/2021)
06/09/2021	<u>79</u>	Defendant EXHIBIT LIST as to defendant Juan Carlos Cabrera (tlw) (Entered: 06/09/2021)
06/09/2021	<u>80</u>	Plaintiff EXHIBIT LIST by USA as to Juan Carlos Cabrera (tlw) (Entered: 06/09/2021)
06/09/2021	<u>81</u>	JURY TRIAL WITNESS LIST as to defendant Juan Carlos Cabrera (tlw) (Entered: 06/09/2021)
06/10/2021	<u>82</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Excerpt of the Testimony of Witness Cisneros) as to Juan Carlos Cabrera held on 6/8/2021 before Judge Larry Alan Burns. Court Reporter/Transcriber: Amanda M. LeGore. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E–File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 7/1/2021. Redacted Transcript Deadline set for 7/12/2021. Release of Transcript Restriction set for 9/8/2021. (akr) (Entered: 06/10/2021)
08/23/2021	<u>83</u>	PRE–SENTENCE REPORT as to Juan Carlos Cabrera. Report prepared by: Christina E. Jones. (Document applicable to USA, Juan Carlos Cabrera.) (Iribe, K.) (Entered: 08/23/2021)
09/20/2021	<u>84</u>	SENTENCING SUMMARY CHART by USA as to Juan Carlos Cabrera (Muskat, Amanda) (dxf). (Entered: 09/20/2021)
09/21/2021	85	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: On the Court's own motion, the Sentence With PSR is reset for 9/28/2021 09:00 AM before Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 09/21/2021)
09/22/2021	86	NOTICE OF CHANGE OF HEARING as to Defendant Juan Carlos Cabrera: Upon the request of Benjamin Davis, FD, with no objection by government counsel, the Sentence With PSR set for 9/28/21 is vacated and continued to 11/15/2021 03:00 PM before Judge Larry Alan Burns. (no document attached) (tlw) (Entered: 09/22/2021)
11/09/2021	<u>87</u>	SENTENCING MEMORANDUM by Juan Carlos Cabrera (Davis, Benjamin) (dxf). (Entered: 11/09/2021)
11/10/2021	<u>88</u>	Supplemental Sentencing Document: Response in Opposition to Defendant's Objections to the Presentence Report by USA as to Juan Carlos Cabrera, re <u>87</u> Sentencing Memorandum (McDonald, Colin) (dxf). (Entered: 11/10/2021)
11/15/2021	89	Minute Entry for proceedings held before Judge Larry Alan Burns: Sentence With PSR Hearing held on 11/15/2021 for Juan Carlos Cabrera (1). Count(s) 1, Bureau of Prisons for 24 months to run concurrent to count 2, no supervised release, no fine, assessment \$100.00 – waived; Count(s) 2, Bureau of Prisons for 51 months to run concurrent to count 1, supervised release 3 years, no fine, assessment \$100.00 – waived. (Interpreter Edith Monroy). (Court Reporter/ECR Cynthia Ott). (Plaintiff Attorney Colin McDonald, AUSA). (Defendant Attorney Benjamin Davis, FD). (Ryan Alejandria, USPO). (no document attached) (tlw) (Entered: 11/16/2021)

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11/16/2021	<u>90</u>	NOTICE OF APPEAL by Juan Carlos Cabrera. Fee Waived. (Notice of Appeal electronically transmitted to the US Court of Appeals.) (Davis, Benjamin) (akr) (Entered: 11/16/2021)
11/16/2021	<u>91</u>	USCA Case Number 21–50259 for <u>90</u> Notice of Appeal filed by Juan Carlos Cabrera. (akr) (Entered: 11/16/2021)
11/16/2021	<u>92</u>	USCA Time Schedule Order for <u>90</u> Notice of Appeal filed by Juan Carlos Cabrera. (NOTICE TO PARTIES of deadlines regarding appellate transcripts: Appellant shall file transcript designation and ordering form with the US District Court, provide a copy of the form to the court reporter, and make payment arrangements with the court reporter on or by 12/7/2021 (see Ninth Circuit Rule 10–3.2); Due date for filing of transcripts in US District Court is 1/6/2022.) (akr) (Entered: 11/16/2021)